87-456 ①

No. ....

Supreme Court, U.S.
FILED
SEP 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

MAUDE CLEVENGER SIM,
Appellant,
v.

OPAL C. COMISKEY and EDITH R. WRIGHT,
ALAN M. WOOD,
ROBERT M. SPIRE, Attorney General
of Nebraska,
Appellees.

On Appeal from the Supreme Court of Nebraska

JURISDICTIONAL STATEMENT

J. PATRICK GREEN
2500 California Street
Omaha, Nebraska 68178
(402) 280-2872

Counsel of Record

HARVEY A. NEUMEISTER
KENT J. NEUMEISTER
1201 Second Corso
Nebraska City, Nebraska 68410
(402) 873-5611

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

159 pp

QUESTIONS PRESENTED

1. Is an elderly person deprived of liberty, property, and privacy without due process of law in violation of the Due Process Clause of the Fourteenth Amendment when she is placed under guardianship and conservatorship under Neb. Rev. Stat. §§ 30-2617 to 30-2661 (Reissue 1985) even though she already has entered a nursing home and has established a durable power of attorney and an irrevocable trust with herself as the lifetime beneficiary to take care of her personal health and welfare and her property for the rest of her life, and she has named her longstanding lawyer to be her attorney-in-fact and trustee; and there is no allegation or finding of probable cause to believe that her private legal arrangements are not working for the purposes they were established?

2. Is an elderly person deprived of liberty, property, and privacy without due process of law in violation of the Due Process Clause of the Fourteenth Amendment when she is subjected to a proceeding for guardianship and conservatorship under Neb. Rev. Stat. §§ 30-2617 to 30-2661 (Reissue 1985), including court orders appointing a guardian ad litem to represent her and appointing her personal doctor to examine her and scheduling a hearing on the petition, when there is no statutory requirement that the petition for guardianship contain any specific factual basis to justify the proceeding?

3. Is an elderly person deprived of liberty, property, and privacy without due process of law in violation of the Due Process Clause of the Fourteenth Amendment when she is subjected to a proceeding for guardianship and conservatorship under Neb. Rev. Stat. §§ 30-2617 to 30-2661

(Reissue 1985) when there is no statutory guarantee that she has the right to have a probable cause hearing to act as a restraint against any unjustified state action?

4. Is an elderly person in a guardianship proceeding deprived of the right to have the advice and assistance of counsel and the right to have a fair trial in violation of the Due Process Clause of the Fourteenth Amendment when the trial judge orders that the person's lawyers are prohibited from having any notice of an unannounced psychiatric examination of her, and from giving her any advice and assistance before the unannounced examination?

5. Is an elderly person in a guardianship proceeding deprived of the right to have the advice and assistance of counsel and the right to have a fair trial in violation of the Due Process Clause of the Fourteenth Amendment when the trial judge orders that the person has the right to have a court reporter be present at her psychiatric examination to prepare a transcript, and the person volunteers to pay for the transcript, but the person is deprived of the transcript when the psychiatrist neglects to follow the judge's orders that he make arrangements for a court reporter to be present to transcribe the examination?

LIST OF PARTIES

The parties to the proceedings below were the appellant Maude Clevenger Sim and the appellees Opal C. Comiskey, Edith R. Wright, Alan M. Wood, and Robert M. Spire, the Attorney General for the State of Nebraska.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES 2

HOW THE FEDERAL QUESTIONS WERE RAISED 2

STATEMENT OF THE CASE 3

THE QUESTIONS ARE SUBSTANTIAL 23

CONCLUSION 30

APPENDIX 1a

APPENDIX A.

In re Guardianship and Conservatorship of Maude Clevenger Sim, 225 Neb. 181, 403 N.W. 2d 721 (1987). 1a

APPENDIX B.

Opinion and Order of the District Court of Otoe County, Nebraska, dated March 18, 1985. ..... 35a

TABLE OF CONTENTS—Continued

Page

APPENDIX C.

Order of the County Court of Otoe County, Nebraska, dated July 6, 1984. .... 40a

APPENDIX D.

Order of the Nebraska Supreme Court overruling the appellant's motion for rehearing, filed June 17, 1987. .... 57a

APPENDIX E.

Notice of Appeal to the Supreme Court of the United States, filed June 22, 1987. .... 58a

APPENDIX F.

Neb. Rev. Stat. Ch. 30, Art. 26, Parts 3 and 4 (Reissue 1985). 60a

APPENDIX G.

Neb. Rev. Stat. Ch. 30, Art. 26, General Comment (Reissue 1979). 91a

APPENDIX H.

Neb. Rev. Stat. § 30-2662 (Reissue 1979). 92a

APPENDIX I.

Neb. Rev. Stat. § 27-504 (Reissue 1985). 93a

APPENDIX J.

Rule 35 of the Discovery Rules of the Nebraska Supreme Court. 94a

APPENDIX K.

Neb. Rev. Stat. § 25-21,149 (Reissue 1985). 95a

TABLE OF CONTENTS—Continued

Page

APPENDIX L.

Neb. Rev. Stat. § 24-541.03(2) (Reissue 1985). 96a

APPENDIX M.

Petition for Appointment of Guardian and Conservator, filed September 3, 1982. .... 96a

APPENDIX N.

Order for Hearing and Appointment of Guardian ad litem and Physician, filed September 3, 1982. .... 99a

APPENDIX O.

Notice To: Randall L. Rehmeier, Guardian ad litem, dated September 8, 1982. .... 100a

APPENDIX P.

Notice To: Dr. Gary L. Rademacher, M.D., dated September 8, 1982. .... 100a

APPENDIX Q.

Objections and Answers to Petition for Guardianship and Conservatorship over Maude Clevenger Sim, and Petition for Declaratory Judgment that L.B. 428 Is Unconstitutional, filed September 17, 1982. .... 102a

APPENDIX R.

Direct Examination and Cross-Examination of Mrs. Alta B. Neumeister at the Trial on June 14, 1984. .... 104a

TABLE OF CONTENTS—Continued

Page

APPENDIX S.

Affidavit of Harvey A. Neumeister, dated November 3, 1982. .... 110a

APPENDIX T.

Affidavit of Harvey A. Neumeister, dated November 20, 1982. .... 112a

APPENDIX U.

Affidavit of Harvey A. Neumeister, dated March 9, 1984. .... 114a

APPENDIX V.

Affidavit of Harvey A. Neumeister, dated March 12, 1984 .... 116a

TABLE OF AUTHORITIES

Cases:	Page
Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981)	29
Conservatorship of the Person and Estate of Early, 35 Cal.3d 244, 197 Cal.Rptr. 539, 673 P.2d 209 (1983)	25
Matter of Forward, 86 A.D.2d 850, 447 N.Y.S.2d 286 (1982)	27
In re Gault, 387 U.S. 1 (1967)	29
Goodner v. Lindley, 721 P.2d 801 (Okla. 1986)	29
Lisenba v. California, 314 U.S. 219 (1941)	30
O'Connor v. Donaldson, 422 U.S. 563 (1975)	25, 26
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	23
Southern Pacific Terminal Co. v. Interstate Commerce Comm'n., 219 U.S. 498 (1911)	23
United States v. Wade, 388 U.S. 218 (1967)	30
Statutes:	
Neb. Rev. Stat. § 24-541.03(2) (Reissue 1985)	17
Neb. Rev. Stat. § 25-21,149 (Reissue 1985)	17
Neb. Rev. Stat. Ch. 30, Art. 26, General Comment (Reissue 1979)	26
Neb. Rev. Stat. § 30-2662 (Reissue 1979)	14
Rule 35 of the Discovery Rules of the Nebraska Supreme Court	29

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

ABA Commission on the Mentally Disabled, *Guardianship and Conservatorship: Statutory Survey and and Model Statute* (1979). 29

Committee on Estate and Tax Planning of the American Bar Association, "The Revocable Living Trust as an Estate Planning Tool," 7 *Real Property, Probate and Trust Journal* 223 (1972). 27

Committee on Persons under Disability of the Trusts and Estates Section of the New York State Bar Association, in Callahan, "The Use of a Convertible Trust in Planning for Disability," 53 *New York State Bar Journal* 422 (1981). 27

McGovern, *Wills, Trusts, and Future Interests: An Introduction to Estate Planning* (West, 1983). 27

Perlin and Sadoff, "Ethical Issues in the Representation of Individuals in the Commitment Process," 45 *Law and Contemporary Problems* 161 (1982). 24

Pickering and Wexler, "Life Services Planning: Counseling elderly and disabled clients," *American Bar Association Journal* (January 1, 1987). 24

Regan, *Tax, Estate & Financial Planning for the Elderly* §§ 13.04[1]-[2] (Matthew Bender, 1985). 27

1 A. Scott, *The Law of Trusts* §§ 1, 2.3-2.8, and 59 (3d ed. 1967). 27

U.S. Bureau of the Census, *An Aging World (Advance Report)* (1987). 23

Wellman, "The New Uniform Probate Code," 56 *American Bar Association Journal* 636 (1970) 27

JURISDICTIONAL STATEMENT

Maude Clevenger Sim, appellant, appeals from the final judgment of the Supreme Court of Nebraska, dated June 17, 1987, holding that Neb. Rev. Stat. §§ 30-2617 to 30-2661 (Reissue 1985), as applied in this case, are not unconstitutional as being violative of Mrs. Sim's right not to be deprived of liberty or property or privacy without due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, dated April 10, 1987, is reported at 225 Neb. 181, 403 N.W.2d 721 (1987), and is reprinted in the appendix hereto, p. 1a, infra.

The opinion and order of the District Court of Otoe County, Nebraska, (Case, D.J.), dated March 18, 1985, has not been reported, and is reprinted in the appendix hereto, p. 35a, infra.

The order of the County Court of Otoe County, Nebraska (McGowan, C.J.), dated July 6, 1985, has not been reported, and is reprinted in the appendix hereto, p. 40a, infra.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on April 10, 1987. See p. 1a, infra. A motion for rehearing was entertained and denied on June 17, 1987, and is reprinted in the appendix hereto, p. 57a, infra.

A notice of appeal to this Court was timely filed in the Supreme Court of Nebraska on June 22, 1987, and is reprinted in the appendix hereto, p. 58a, infra.

The appeal is being docketed in this Court within 90 days from the denial of the rehearing below. The jurisdiction of this Court to review the judgment of the Nebraska Supreme Court is invoked under 28 U.S.C. § 1257 (2), or in the alternative under 28 U.S.C. §§ 1257(3) and 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Nebraska statute for the "Protection of Persons under Disability and Their Property" is codified as Neb. Rev. Stat. §§ 30-2617 to 30-2661 (Reissue 1985). It is hereinafter referred to as the "Nebraska guardianship statute." The relevant provisions of the statute are reprinted in the appendix hereto, p. 60a, infra.

Other statutes involved are (1) Neb. Rev. Stat. Ch. 30, Art. 26 (Reissue 1979). (2) Neb. Rev. Stat. § 30-2662 (Reissue 1979). (3) Neb. Rev. Stat. § 27-504 (Reissue 1985). (4) Revised Rules of the Nebraska Supreme Court, Discovery Rule 35. (5) Neb. Rev. Stat. § 25-21,149 (Reissue 1985). (6) Neb. Rev. Stat. § 24-541.03(2) (Reissue 1985). The statutes are reprinted in the appendix hereto, pp. 91a, 92a, 93a, 94a, 95a, 96a, infra.

HOW THE FEDERAL QUESTIONS WERE RAISED

Mrs. Sim raised the federal constitutional questions in a proper and timely fashion in the Nebraska state courts.

(1) In the County Court of Otoe County, Mrs. Sim raised the claim that Neb. Rev. Stat. §§ 30-2619 to 30-2643 (Reissue 1985) are unconstitutional on various grounds at the following stages of the proceedings: (a) petition for a declaratory judgment, filed on September 17, 1982 (T:15-41); (b) motions six through fourteen, filed on August 15, 1983 (T:133-53, and 157-59); (c) motion filed on March 12, 1984 (T:329-32); and (d) objections to the testimony of Dr. Emmet M. Kenney (June 14, 1984; 133:1 to 154:1)

The County Court ruled that the Nebraska guardianship statute is constitutional in (a) an order filed on August 31, 1983 (T:172-73), and (b) an order dated July 6, 1984 (T:359-71). The County Court overruled Mrs. Sim's objections to Dr. Kenney's testimony (June 14, 1984; 133:1 to 154:1)

(2) In the District Court of Otoe County, Mrs. Sim raised the assignments of error that the County Court erred in failing to hold that Neb. Rev. Stat. §§ 30-2619 to 30-2643 (Reissue 1985) are unconstitutional in (a) brief dated February 1, 1985, and (b) a hearing on February 1, 1985. The District Court ruled that the Nebraska guardianship statute is constitutional in an order dated March 18, 1985. (T:494-99)

(3) In the Supreme Court of Nebraska, Mrs. Sim raised the assignments or error that the County Court and the District Court erred in failing to hold that Neb. Rev. Stat. §§ 30-2619 to 30-2643 (Reissue 1985) are unconstitutional in a brief dated September 27, 1985. The Nebraska Supreme Court considered and expressly rejected Mrs. Sim's federal constitutional claim in its opinion filed April 10, 1987.

STATEMENT OF THE CASE

(1) Mrs. Sim is now 87 years old and has been a resident of Nebraska City for over sixty years. Mrs. Sim grew up in a separate home from her two half-sisters, Edith R. Wright and Opal C. Comiskey, because when Mrs. Sim was an infant, her mother died and her father remarried, and she was sent away to be raised by relatives. Mrs. Sim earned a college degree and became a schoolteacher. Mrs. Sim became an independent businesswoman who operated her own beauty parlor, the Maude C. Sim Hair Stylist Shop, for over 30 years. Generally the business was not profitable because Mrs. Sim aided older people in rest homes and trained young girls as beauticians. Mrs. Sim was named an "Outstanding Woman of Nebraska

City" in 1980. (Trial of June 14, 1984; 63:25 to 69:22. March 15, 1984; E 2F:25-35.)

Mrs. Sim's husband was a superintendent of schools and part-time lawyer. Since 1920, Mr. and Mrs. Sim owned about 30 acres of real estate south of Nebraska City. Mrs. Sim understood about the problems and costs of growing old because her husband was confined in a rest home and the hospital for five years before his death in 1972. Mrs. Sim paid for her husband's care and visited him nearly every day. Mrs. Sim was of the generation who never wanted to be declared insane, as the law called it when a person got older and lost his mind and was put in the insane asylum.

(2) After Mr. Sim died, Mrs. Sim developed the remaining part of her land for sale to Pizza Hut, McDonald's, Pamida, and Alco. For eight years, the commercial development was handled entirely by Harvey A. Neumeister. Mr. Neumeister has been Mrs. Sim's lawyer for over 35 years, and he also handled the estate of her husband. During the development, Mr. Neumeister worked with Mrs. Sim on boundary disputes, state condemnation, driveway encroachments, problems of title, zoning requirements, surveys, abstracts, destruction of her home to clear the land, litigation, quiet title suits, and business dealings. Mrs. Alta B. Neumeister has been one of Mrs. Sim's closest friends for 40 years since the time when Mrs. Sim's beauty shop was located next to Mr. Neumeister's law office. Mrs. Sim babysat for the two Neumeister children.

Mrs. Gladys Beccard, who was age 91 at the trial on June 14, 1984, was one of Mrs. Sim's closest friends. Mrs. Beccard testified: Ever since the 1950's, Mrs. Sim has "trusted [Mr. Neumeister] perfectly, and the only one she could trust she said." Back in the 1950's, Mrs. Beccard heard Wilbur Sim tell his wife, "I think the best that you could do would have Mr. Neumeister take care of your—all of your affairs." (186:16 to 187:9) [Mrs. Beccard is the only witness in the case who was not quoted in the Nebraska Supreme Court opinion.]

(3) Mrs. Neumeister testified that Mrs. Sim prepared the tax materials and quarterly reports for the year of 1981 that she brought to Mr. Neumeister in April of 1982 to work with him on her income tax return. Mrs. Sim signed her income tax return and her check. (June 14, 1984; 69:23 to 71:13)

(4) Mrs. Sim considered her only family to be Robert Comiskey and his wife and their two children. Robert Comiskey is the illegitimate son of Opal Comiskey. Robert was raised and educated by Mrs. Sim, who paid for his four-year college education. Mrs. Beccard testified: "[Mrs. Sim] said she wanted Bob Comiskey and his wife, Joan, to have [her] home, and she wanted to be there, too, she wanted to live downstairs . . . [Mrs. Sim] said it several times . . . ever since they were—right after they were first married." (June 14, 1984; 190:4-19) The Robert Comiskeys have been living with Mrs. Sim since 1975. (200:11 to 202:3)

(5) In June, 1982, Edith Wright and her husband, Vance, had moved into Mrs. Sim's home to stay for a week. Mrs. Wright called Bob and Joan Comiskey to come downstairs into Mrs. Sim's apartment and told them that she and Vance would

> ". . . move over [from Des Moines, Iowa] and take over the job of caring for Aunt Maude. At that time I told her I didn't think it would work, that there just wasn't enough room in the house for all of us. Edith looked at me and said well, we are the half sisters, Bob . . . . [Mrs. Wright said that she and Opal Comiskey] were unhappy with what Mr. Neumeister was doing, because he was not confiding in them, and he was not telling them what they wanted to know, he wasn't divulging any information about Aunt Maude." (202:4 to 205:4)

(6) Opal Comiskey testified in a deposition taken on October 8, 1982, that "I could have married John Perron [Juan Peron, the dictator of Argentina.]." "[T]hat was spiritual connections, you wouldn't understand that." Ms. Comiskey also testified that "There is legal ways" to

get rid of Bob and Joan Comiskey from Mrs. Sim's home because, "No, I don't want them there." (June 14, 1984; 30:10 to 36:17; 51:16 to 52:24)

(7) In June of 1982, Mrs. Sim asked Mr. Neumeister to finish drawing up her durable power of attorney and her trust. It was Mrs. Sim who raised the matter of both legal instruments. Mrs. Sim had already suggested the durable power of attorney four or five times before. Mrs. Neumeister testified that "[Mrs. Sim] wanted a trust that would really protect her." (June 14, 1984; 71:14 to 72:23)

(8) In July, 1982, Mrs. Sim was in the hospital to recover from a fall. Mr. Neumeister testified: ". . . Kent went out with me, and so did Alta. We talked to Maude at different times. Maude said, 'Harvey, look out. They're [the two half-sisters are] out there to get you and they're out to get me.' " When Mrs. Sim was in the hospital, her personal doctor, Dr. Rademacher, had her examined by a psychiatrist and a psychologist. Mr. Neumeister testified:

> "These are another of these things that was being done back of our back and we didn't know what was going on. . . . I didn't do it and Maude didn't do it, and we wondered how it ever did happen. . . . I did not realize this was going on. But she [Mrs. Sim] knew it was going on. That's why she said these words." (Trial of March 22, 1984; 169:20 to 173:11)

(9) Mrs. Beccard testified: In August, 1982, she was with Mrs. Sim and Mr. and Mrs. Neumeister sitting in a car across from Mrs. Sim's home. "And then [Mrs. Sim] wasn't talking much, but she was thinking about everything, and she says I wish you'd get on with the—take care of the business and take care of everything for me." Mrs. Sim said she wanted her trust taken care of. "I was relieved because she [Mrs. Sim] seemed to be happy with Mr. Neumeister, the way he's handling things." (June 14, 1984; 187:24 to 190:3) The date of the conversation was August 8, 1982. (76:4 to 77:18)

> [However, the Nebraska Supreme Court states: "The key flaw in this assignment is the word 'already,' because although the record shows that Sim had en-

> tered a nursing home before the petition was filed, there had been no decisions 'already made' concerning her property." See p. 22a, infra.]

(10) Mrs. Sim valued her privacy and never discussed her business or property with anyone except her lawyer, Mr. Neumeister. Mrs. Sim respected the privacy of other people as well.

> Mrs. Beccard testified: "[W]e never talked about property. Her business is her business, and mine was [mine] . . . . I never knew what she had or how much. I knew that there were some pieces, but I didn't know anything about her business, [she] didn't say how much she had or didn't have, and she didn't know anything about my property." (June 14, 1984; 191: 9-23)
>
> Robert Comiskey testified: "[A]s far as business or financial decisions, she [Mrs. Sim] always made those in the presence of Harvey Neumeister, her attorney. Those were just things she did not discuss with Joan and I." (June 14, 1984; 207:8-12)

(11) On August 10, 1982, while Mrs. Sim was still recovering from her fall, she decided to move into a nursing home in Nebraska City. (June 14, 1984; 76:4 to 77: 12) Robert Comiskey testified: During August, 1982, Mrs. Sim "made numerous decisions. One was when she had finally decided herself to go into a nursing home." (June 14, 1984; 207:4-7) [However, the Nebraska Supreme Court states that "the record does not disclose that Sim herself made the decision to enter a nursing home." See p. 22a, infra.]

(12) On September 3, 1982, in the County Court of Otoe County, Mrs. Sim's two half-sisters sued her for guardianship and conservatorship. (T:5-7) Ms. Comiskey and Mrs. Wright prayed that they both be appointed as the guardian and conservator over Mrs. Sim.

(13) The petition only quotes the conclusory language of the Nebraska guardianship statute in boilerplate fashion. The only facts in the petition are as follows:

"COMES NOW, Opal C. Comiskey and Edith R. Wright, and allege as follows:

> "1. That they are the natural sisters of Maude Clevenger Sim, a protected person who is 82 years of age and resides at 706 First Avenue, Nebraska City, Nebraska, 68410, and that they are interested in the welfare of said Maude Clevenger Sim." (T:5-7)

(14) On September 3, 1982, the same day the petition was filed, the County Court of Otoe County issued an order appointing a guardian ad litem for Mrs. Sim; appointing Mrs. Sim's personal doctor, Dr. Rademacher, to examine her and report in writing to the court; and setting a hearing on the petition for September 24, 1982. (T:8) The petition and the order are reprinted in the appendix hereto, p. 96a, and p. 99a, infra.

> [However, the Nebraska Supreme Court held: "[A] petition such as involved in this case, which is in the words of the relevant statute, is adequate in the absence of a motion for a more definite statement." See p. 25a, infra.]

(15) The Nebraska guardianship statute makes no provision for Mrs. Sim to have a probable cause hearing to determine whether there is any justification for the State of Nebraska to subject her to a proceeding for guardianship.

(16) On September 7, 1982, after receiving the petition, Mrs. Sim called Mr. and Mrs. Neumeister over the telephone, and they went to see her. Mrs. Sim said, "[I]sn't it terrible to have my half-sister[s] sue me." Mrs. Sim took Mr. Neumeister's hand and said, "Now, Harvey, you're going to have to protect me all the way; I don't want them [Opal Comiskey and Edith Wright]." "I just don't want anything to do with those people." Mrs. Sim said this not only about her half-sisters but about their attorney "Richard Hoch, because he'd sued her so many times before." Mrs. Sim told Mr. Neumeister, "I want you to fight it to the end, I depend on you . . . . You get Mr. Walker because Mr. Walker helped in the other lawsuits against Richard Hoch." (June 14, 1984; 78:20 to 79:18)

Mrs. Beccard testified: Mrs. Sim "was very unhappy" when she was sued for guardianship. "[S]he didn't know why they'd do such a thing in the first place, and she felt that they were treating her very unfair after all the years that she'd tried to help the family." (June 14, 1984; 193: 18-25)

(17) Mrs. Sim had always had troubles and fights with her two half-sisters. After the half-sisters sued Mrs. Sim, she wanted nothing to do with them. Mrs. Neumeister testified: "Every time she [Edith Wright] came over [from Des Moines to Nebraska City] they—she upset Maude, and Maude would call us over the telephone . . . from her own home." (June 14, 1984; 108:14-24)

Mr. Neumeister testified:

> "She [Mrs. Sim] was very fearful, and has been for quite a while of some of her own people [the half-sisters] that are sitting in the courtroom—would try to do something to her. That's exactly why she has been more or less of the opinion, and it is her opinion, to stay away from them and not to talk to them." (March 22, 1984; 163:20-25)
>
> "I've answered that question three or four times. They're [the two half-sisters] just a lot—and I hate to say this. They're just a lot of troublemakers and they're fighting all the time. You know that. She [Mrs. Sim] didn't want them around. I did what I was supposed to do at her [Mrs. Sim's] wishes. In fact, we've even got another witness in here that will tell you she [Mrs. Sim] told me more than once, 'Good riddance,' when those people [the half-sisters left]—that's her words. There comes a time when you have to bring order out of things." (March 22, 1984; 185:9-18)
>
> "I will only say one thing. I don't want her [Mrs. Sim] bothered by those sisters, and I don't want somebody going—and she [Mrs. Sim] doesn't either—When they [Mrs. Sim] take your hand and hold it, 'Now, Harvey, you protect me'—when your clients ask you that, you do what you're supposed to." (March 22, 1984; 186:2-7)

[However, the Nebraska Supreme Court states that Mrs. Sim was prevented by her attorneys from having the "access" to see her two half-sisters. See pp. 31a-32a, infra.]

(18) On September 8, 1982, Mrs. Sim, acting through her attorney, Mr. Neumeister, sent notices to the guardian ad litem and her personal doctor, Dr. Rademacher. Mrs. Sim asserted her rights and refused to recognize their authority. It would not have been necessary for Mrs. Sim to take these steps if, among other things, the Nebraska guardianship statute required a proper petition and guaranteed a probable cause hearing. The notices are reprinted in the appendix hereto, p. 100a, infra. [However, the Nebraska Supreme Court states that Mrs. Sim's attorneys "initiated a number of steps which prevented the orderly progress of the proceeding." See, p. 7a, infra.]

(19) Mrs. Neumeister testified: On September 16, 1982, Mrs. Sim asked Mr. Neumeister, "[H]ow are you coming on that trust, I want it."

> "She [Mrs. Sim] wanted the house deeded to Bob and Joan, because she says they're going to get it anyway, and she says I want them to have it now, I want to deed my—or give my car to them so that they can take me around, which I know they will, they'll take care of me. And she says I want to give the shop to Darlene Hershenburger, she's—she [Mrs. Sim] says, she's [Darlene has] always been my best attendant." (June 14, 1984; 80:3-23)

Mrs. Sim had trained Mrs. Haschenburger and worked with her for twenty-seven years. "She always thought Darlene was practically her daughter." (69:2-3)

(20) On September 17, 1982, in the County Court of Otoe County, Mrs. Sim filed her answer to the petition for guardianship. The answer was captioned, "Objections and Answers to Petition for Guardianship and Conservatorship over Maude Clevenger Sim, and Petition for Declaratory Judgment That L.B. 428 Is Unconstitutional." Mrs. Sim herself signed a verification clause, dated September 16, 1982, which is attached to her answer. Mrs. Sim's

answer is stamped: "FILED: SEP. 17, 1982. Otoe County Court." Mrs. Sim's answer is found in the Transcript at pages 15-41. Mrs. Sim's answer states: "4. Objector specifically denies all other allegations in the petition filed against her unless they are hereinafter specifically admitted." (T:16) The relevant part of the answer is reprinted in the appendix hereto, p. 102a, infra.

> [However, the Nebraska Supreme Court states: "At no time, however, was an answer filed alleging that Sim was competent . . . ." "Because of these factors, and because among the more than 45 pounds of paper comprising the record there is not a single answer denying Sim's incompetency, the failure to record the psychiatric evaluation must be viewed as harmless." See p. 7a, and pp. 28a-29a, infra.]

(21) On September 17, 1982, in the District Court of Otoe County, Mrs. Sim brought a petition for a declaratory judgment that the Nebraska guardianship statute is unconstitutional on its face and as applied to Mrs. Sim, and an injunction against the guardianship proceeding in the county court. On September 17, 1982, in the County Court, Mrs. Sim moved to continue the hearing set for September 24, 1982, until after the District Court had determined the constitutionality of the Nebraska guardianship statute. (T:42-43)

(22) William L. Walker, a practising attorney in Lincoln for more than 50 years, was Mrs. Sim's lead attorney from the time the guardianship was started until Mr. Walker's death on January 13, 1985. During that period, Mr. Walker represented Mrs. Sim at all the hearings or trials, including six in the county court, six in the district court, and an argument in the Nebraska Supreme Court. See pages 15-491 in the Transcript for all the documents that Mr. Walker filed on behalf of Mrs. Sim. [However, the Nebraska Supreme Court states that Mrs. Sim's attorneys were only Harvey A. Neumeister and Kent J. Neumeister. The Nebraska Supreme Court never mentions Mr. Walker as Mrs. Sim's attorney. See pp. 1a-34a, infra.]

(23) On September 21, 1982, the guardian ad litem went to Mrs. Sim's nursing home and interviewed her. (March 22, 1984; 56:5 to 57:19)

(24) On September 22, 1982, County Judge Albert C. Walsh granted a continuance of the hearing on September 24, 1982, until after the District Court had ruled on Mrs. Sim's application for a temporary injunction. (T:51-52)

(25) On October 7, 1982, in Mr. Walker's office in Lincoln, Mrs. Sim conveyed her home to Robert and Joan Comiskey, with Mrs. Sim reserving a life estate in her home; executed a bill of sale of her beauty shop to Darlene Haschenburger; and gave a certificate of title of her car to the Robert Comiskeys. Mrs. Sim executed a durable power of attorney, making Harvey A. Neumeister the attorney-in-fact. Mrs. Sim put the balance of her property in an irrevocable trust, made herself the lifetime beneficiary and Harvey A. Neumeister the trustee, and executed the trust. Mr. Walker, Mr. and Mrs. Neumeister, and a notary public Don G. Renner were present when Mrs. Sim executed the documents.

> [However, the Nebraska Supreme Court states: "The conveyances, trust, and powers of attorney were signed after the subject proceeding was initiated, under circumstances which leave us in doubt as to Sim's level of understanding of the nature and finality of her acts." See p. 22a, infra.]

(26) Mr. Neumeister testified that on October 7, 1982,

> "We [Mrs. Sim and I] went over the papers real carefully. All of them were gone over. I don't want to say that every word was read, because the papers had all been read before by Maude, all of them, completely. I even put my hand over each one when they were signed and I said to her, "Do you understand these? Do you know what you're doing? Are you satisfied?" I won't want to tell you right now those [were my] exact words, but there was even more than that said, but along that same line." (March 22, 1984; 155:15-23)

> "Maude's answers were in every one exactly that's what she wanted. She was very definite in what she expected. She had been that way with me much of the time, most of the time. She [Mrs. Sim] said right out, she says, "Well, that's even the way I've got it in my will as to the house." By the way, she reserved her life estate in there [her house]." (156:10-16)

Mrs. Neumeister testified about all the circumstances on October 6, 1982, and October 7, 1982, concerning Mrs. Sim's execution of the documents in Mr. Walker's office. (June 14, 1984; 80:24 to 85:25; 111:24 to 112:6) The relevant testimony of Mrs. Neumeister is reprinted in the appendix hereto, p. 104a, infra.

> [However, the Nebraska Supreme Court states: "Mrs. Neumeister also testified that her husband asked Sim whether she understood what she was signing, but did not give any testimony as to Sim's response to that question." See p. 9a, infra.]

During her testimony, Mrs. Neumeister referred to notes from her daily log. Mrs. Neumeister had not typed the notes herself because of health reasons. (62:23 to 63:1; 70:6-22; 89:6 to 94:17) Compare p. 8a, infra.

(27) Mrs. Sim's Trust Agreement and Declaration makes the following provisions:

> "I, Maude C. Sim, establish this trust so that some of my relatives or any one else do not trouble me. What funds and property I have come entirely from my husband's, Wilbur W. Sim, side of the family. I always keep my property in good order. However, I set up this irrevocable trust to make it absolutely unnecessary and impermissible for anyone including the State of Nebraska to put my person under guardianship or my property under conservatorship. My own protection of my own property under this trust defeats all attempts by some, including the State, to claim that my property is not being conserved for my benefit."
>
> "I definitely have a vested property right to keep my property private to me alone, and so I refuse to

> allow the contents of this trust, or the exact nature, amount, or location of my property, to be disclosed in any judicial proceeding or otherwise. My trustee or attorneys by affidavit can only show there is executed a valid irrevocable trust and declaration and read this paragraph if necessary." . . . .
>
> ". . . I do not ever want or need a guardian or conservator by court action this trust agreement takes care of me personally and of my property."

The provisions of Mrs. Sim's trust are set out in Mr. Neumeister's Affidavit, dated November 3, 1982. (Hearing on August 26, 1983; E V:44-45. March 22, 1984; E4: 134-35, 160) The affidavit is reprinted in the appendix hereto, p. 110a, infra.

(28) Mrs. Sim's conveyances are described in Mr. Neumeister's Affidavit, dated November 20, 1982. (March 22, 1984; E5: 139, 160) The affidavit is reprinted in the appendix hereto, p. 112a, infra.

(29) The purposes of Mrs. Sim's trust are stated in Mr. Neumeister's Affidavit, dated March 9, 1984. (March 15, 1984; E 2F: 25-35. March 22, 1984; 152: 17-19, and 153:9-12) The affidavit is reprinted in the appendix, p. 114a, infra.

(30) Mrs. Sim's durable power of attorney, dated October 7, 1982, states: "THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY DISABILITY OF THE PRINCIPAL." The durable power of attorney is set out in Mr. Neumeister's Affidavit, dated March 12, 1984. (March 15, 1984; E 2G: 26. March 22, 1984; E7: 146, 160) The affidavit is reprinted in the appendix hereto, p. 116a, infra. Also, see p. 92a, infra.

(31) On October 18, 1982, after the county court was informed that Mrs. Sim had not obtained injunctive relief in the district court, Judge Walsh set a pre-trial conference for November 12, 1982. The Nebraska guardianship statute makes no provision for a probable cause hearing. On November 12, 1982, Judge Walsh issued an order vacating the appointment of both the guardian ad litem and Dr. Rademacher. On the county court's own motion, Judge

Walsh ordered that a probable cause hearing be held on December 1, 1982, to determine whether an independent physician should be appointed to examine Mrs. Sim; whether the half-sisters should be allowed to take the deposition of Mrs. Sim; and whether the matter should be set for trial. (T:55-56; 67-68)

(32) On the occasions of November 29, 1982, December 17, 1982, and December 28, 1982, the half-sisters themselves moved the county court for a continuance of the probable cause hearing. (T:69, 79, 80) In the County Court of Otoe County, there is a rotation of county judges every six months.

(33) On December 8, 1982, and January 26, 1983, Mrs. Sim moved the county court to continue the probable cause hearing until after the district court had made a final decision on her petition for a declaratory judgment. On March 29, 1983, the District Court dismissed Mrs. Sim's petition for want of jurisdiction. On May 3, 1983, Mrs. Sim appealed the District Court's denial of her motion for a rehearing to the Nebraska Supreme Court. On May 3, 1983, Mrs. Sim moved the county court to continue the probable cause hearing for an indefinite period of time until after the Nebraska Supreme Court had ruled on her appeal challenging the constitutionality of the guardianship statute. On May 6, 1983, County Judge Jeffrey L. Campbell ordered an indefinite continuance. (T:73-74, 81-82, 84-88, 90-94, 105-06)

(34) Just because Mrs. Sim was appealing her declaratory judgment case to the Nebraska Supreme Court and was requesting a continuance in the county court does not mean that she waived her continuing right to have a probable cause hearing in the county court before she could be subjected to a medical examination or a trial. Just because Mrs. Sim is held to be incompetent after a medical examination does not mean that she has no right to have a probable cause hearing to force the State to justify the examination.

[However, the Nebraska Supreme Court held: "In the context of this case, however, the assignment [of error relating to the probable cause hearing] presents a nonissue because Sim's attorneys prevented any examination for many months, and the examination when finally conducted, established that the allegations of the petition as related to Sim's condition were correct." See p. 26a, infra.]

(35) On May 17, 1983, the half-sisters moved the county court for a reconsideration of Judge Campbell's order of May 6, 1983. On July 8, 1983, County Judge Eugene T. Atkinson vacated Judge Walsh's order of November 12, 1982, that Mrs. Sim has the right to a probable cause hearing. Judge Atkinson held that the Nebraska guardianship statute makes no provision for a probable cause hearing. (July 8, 1983; 22:1-9) Judge Atkinson also vacated Judge Campbell's order of May 6, 1983, for an indefinite continuance; set an omnibus hearing on all pre-trial motions for August 26, 1983; and scheduled a trial for September 28 and 30, 1983. (T:96-104, 129-30)

(36) On August 15, 1983, in the Otoe County Court, Mrs. Sim filed various motions on her petition for a declaratory judgment that the guardianship law is unconstitutional. (T:133-153) On August 26, 1983, Judge Atkinson held a hearing on the motions. At the hearing, Judge Atkinson received into evidence three affidavits of Harvey A. Neumeister, dated November 3, 1982, November 20, 1982, and August 15, 1983. Mrs. Sim introduced the affidavits in support of her petition for a declaratory judgment, and her motion for a summary judgment. (August 26, 1983; 40:19-23)

(37) At the hearing on August 26, 1983, Dr. Richard E. Shugrue, a Professor of Constitutional Law at the Creighton University School of Law in Omaha, Nebraska, testified through a deposition taken on February 9, 1983, that the Nebraska guardianship statute is unconstitutional on various grounds. (E Y-Z: 47-49)

(38) On the morning of August 31, 1983, Mrs. Sim went home from the nursing home to her own home in

Nebraska City. Mrs. Sim has the right to travel to her own home, and the right to live in her own home.

(39) On August 31, 1983, Judge Atkinson filed an order in the Otoe County Court. The order is stamped: "FILED: AUG. 31, 1983. Otoe County Court." (a) In the order, Judge Atkinson declared the status of Mrs. Sim's constitutional rights by ruling that the Nebraska guardianship statute is constitutional. (b) Judge Atkinson also appointed two doctors to subject Mrs. Sim to a psychiatric examination. The order was not addressed to Mrs. Sim or served on her. (T:172-174)

Neb. Rev. Stat. § 25-21,149 (Reissue 1985) provides that a declaratory judgment which declares the "rights, status, and other legal relations" of a person "shall have the force and effect of a final judgment or decree." See p. 95a, infra. During the afternoon of August 31, 1983, in the Otoe County Court, Mrs. Sim filed a "Notice of Appeal" of Judge Atkinson's order of August 31, 1983, to the District Court of Otoe County. (T:175-76, 189-91)

Neb. Rev. Stat. § 24-541.03(2) (Reissue 1985) provides: "In appeals in matters arising under the Nebraska Probate Code the appeal shall be a supersedeas for the matter from which the appeal is specifically taken, but not for any other matter." See p. 96a, infra. When the county court tried to block Mrs. Sim's appeal, she brought a mandamus action in the state district court against the county court and a civil rights action in the federal district court against the county court. On September 21, 1983, Judge Atkinson ordered:

> "It further appearing that the appeal being a supersedeas to certain matters essential to a hearing on the merits, the trial set for September 28 and 30, 1983 is therefore continued until a final determination of those matters." (T:187-94, 301)

(40) On about October 2, 1983, while Mrs. Sim was still living at home, she fell and broke her hip. Mr. Neumeister made arrangements for Mrs. Sim to be taken to Bryan Memorial Hospital in Lincoln for an operation by an orthopedic specialist. On January 8, 1984, Mrs.

Sim was discharged from the hospital, and she moved into the Milder Manor Nursing Home in Lincoln. Mrs. Sim's general physician is Mr. Neumeister's own doctor in Lincoln. (March 22, 1984; 189:1 to 190:12) Mr. Neumeister testified:

> "Now I think, Richard, that the reason she didn't go back [to the nursing home in Nebraska City] is because she fell down and fractured her hip." ". . . I spent considerable time finding out where was a good place to go. [In Milder Manor,] She's got one of the finest places there is. Everybody will tell you that. . . . By taking her there, she then was able to qualify for extra medical attention from Medicare . . . and that's one of the very few places you can get that." (March 22, 1984; 177:3-5; 187:10-22)
>
> "Neither the doctors nor the hospital involved in Mrs. Sim's operation ever raised one question about my legal authority as the lawyer and trustee for Mrs. Sim to help make all these medical decisions for her welfare, and the doctors and the hospital are highly respected. I believe that if Mrs. Sim had not had her trust, she would not be living today." (March 15, 1984. E 2F: 25-35)

(41) Mr. Neumeister stated that after Mrs. Sim moved into her nursing home in Lincoln

> "[i]t must be said that Mrs. Sim's improved condition and happiness the last five months have been entirely due to her being away from all the troubles and actual fighting caused by her two half-sisters whenever they came to visit her in Nebraska City. There must be no return to these prior conditions. Mrs. Sim must have no more pounding on her door, or being called names, or having the lock changed on her door, or being locked in her home, or having her room searched when she walks down the hall, or having someone try to take over her bank account, or having someone just move into her home, or having someone try to take her car away from her, or having someone try to get her money before she dies so that person can take a vacation trip to South America. All

> of these things Mrs. Sim's lawyer and trustee has had to contend with." (March 15, 1984; E 2F:25-35)

There is no legal obligation on Mrs. Sim's attorneys to tell her half-sisters anything about Mrs. Sim when they have brought a lawsuit against her, she does not want to see them, and her doctors advise that she not be disturbed.

Reverend Samuel W. Hofer testified that before Christmas of 1983, he tried to call Mr. Neumeister about Mrs. Sim. Rev. Hofer testified that Mr. Neumeister did not refuse to tell him about Mrs. Sim because "I never was able to reach him, so he never refused to tell me, but I never could contact him." (March 22, 1984; 120:6-15)

> Mr. Neumeister testified: "Joan [and Bob] Comiskey knew where she [Mrs. Sim] was and I knew where she was, and it was understood amongst us, and this was very much what—in talking it over with the [Mrs. Sim's] doctors, that's what we should do, and we didn't want any more—I think there's an affidavit. We didn't want any more of this fighting [between the two half-sisters and Mrs. Sim] . . . The pastor wasn't even thought of." (March 22, 1984; 181:5-18)

After Mrs. Sim's appeal was filed in the county court on August 31, 1983, there was no hearing in the county court until March 15, 1984. The county court did not ask about Mrs. Sim's whereabouts until March 15, 1984.

> [However, the Nebraska Supreme Court states: "Harvey and Kent Neumeister continued to hide Sim for more than half a year, refusing to disclose her whereabouts to Sim's half sisters, to her pastor, or to the court." See p. 11a, infra.]

(42) On February 23, 1984, County Judge Robert C. McGowan ordered that Mrs. Sim would be subjected to a trial on March 22, 1984. (T:316) Judge McGowan made this order without holding a probable cause hearing to justify the trial. On March 15, 1984, during a hearing on various motions of Mrs. Sim, Judge McGowan ruled that Mrs. Sim would be subjected to a medical examination. (40:12-15) Judge McGowan issued this ruling with-

out making any determination of probable cause to justify the examination.

(43) At the trial on March 22, 1984, Judge McGowan made the following orders:

> "All right. Now I'm going to appoint some doctors to examine her, and I want to say this to everybody concerned, I don't want anybody interfering with any doctors. I don't want anybody to throw any obstacles in their way . . . If anybody does that, I will give you fair warning I will cite them for contempt of Court . . ."
>
> "I want the doctors to examine her. I don't care if there is a reporter there to report what the questions are and everything, but I'm not going to turn it into a courtroom atmosphere or allow it to be turned into a courtroom atmosphere when these doctors examine her." "I won't tolerate this. I'm going to say that. This thing has been stonewalled enough and I don't want to let it be stonewalled anymore." (196:22 to 197:18)
>
> "But I'm going to say that I don't want any interference with doctors, and I don't want a courtroom atmosphere. If somebody wants a reporter there to record it, it's all right with me. I don't care. But there are not going to be any attorneys participating in this thing. It's a medical question at this point and the Court has the authority to appoint them. They've been appointed and they've been, you know, told to just get lost, so to speak. Well, that, I will not put up with." (198:22 to 199:5)
>
> "And in order that the examination will be, you know, as objective as it can be, I'm not going to announce in advance when it's going to be. I don't want anybody going down at the last minute and coaching people. I want this thing to be as spontaneous as it can be for the purposes of an examination. I don't want anybody to interfere with it. I won't put up with it. If I find there is interference with the examination, I will deal with it accordingly." (199:13-21)
>
> "Do you desire that I tell him [the doctor] or them to get a court reporter to record the examina-

> tion and the interview? If you wish so, I will see that it's done." (203:10-12)

(44) After the trial on March 22, 1984, Mrs. Sim's attorneys obeyed Judge McGowan's order and stayed away from Mrs. Sim until after Judge McGowan told them on June 6, 1984, that the unannounced examination of Mrs. Sim had been completed on April 28, 1984. Kent J. Neumeister testified:

> "Well, it was following the March 22 hearing in this Court that our understanding was that all the attorneys in this case were under an order not to see Mrs. Sim, not to talk to her, not to contact her, because we weren't supposed to interfere with any medical examination that was going to be conducted of her. And the order was that we weren't supposed to coach her or prepare her or get her ready for the examination, that the examination was supposed to be secret in nature and was supposed to come as a surprise to Mrs. Sim. So because of that we couldn't go near her, because if we did, and the doctors' examination took place right after that or any time after that, we'd be in violation of that court order, because it could be interpreted as though we had tried to tamper with that examination and had done something to prepare her for it." (June 14, 1984; 225:10 to 226:1)
>
> [The Nebraska Supreme Court states: "It is to be noted in the first instance that, as reflected in part II of this opinion, the county court only required that the attorneys not interfere with the psychiatric examination; no order prevented the attorneys from consulting with Sim either before or after the examination." See p. 26a, infra.]

(45) On March 23, 1984, in a letter to Judge McGowan, Mrs. Sim's attorneys stated: "As we promised at the hearing on March 22, 1984, we are informing you that we want to have a court reporter present at the medical examination of Maude Clevenger Sim . . . . We will pay the General Reporting Service. Thank you." (June 14, 1984; E3: 132:1-8)

(46) On April 11, 1984, Judge McGowan made an order in a letter to Dr. Emmet M. Kenney:

> "I also desire that a court reporter be present and not only to take notes on the interview, but to actually record it. The voice responses are often more informative than the written response after transcription by the reporter. Please let me know when you plan to go and I will call the reporting service and make arrangements for the reporter to meet you at the nursing home." (June 14, 1984; E3; 132:1-8)

(47) Mrs. Sim was deprived of a transcript of her psychiatric examination. Dr. Kenney examined Mrs. Sim without making arrangements for the reporter to be present at the examination. (June 14, 1984; 148:9 to 150:2)

> [The Nebraska Supreme Court states: "The county court did not declare any "right" to have the examination recorded or that he, the judge, wanted it recorded." See. pp. 27a-28a, infra.]

(48) The guardian ad litem testified: During the interview which he conducted with Mrs. Sim on the date of September 21, 1982,

> "And she indicated to me that she didn't feel that she was incompetent and that she didn't need or want the two sisters or either of them appointed for her as guardian and conservator, and that Mr. Neumeister had been taking care of her things for her and that she felt that he could continue to do that for her." (March 22, 1984; 86:9 to 89:15)

(49) Dr. Kenney stated: During his examination of Mrs. Sim on the date of April 28, 1984,

> "In her defense when I asked her to sign a 'legal paper', I didn't explain what it was other than describing it as a legal paper she declined to sign, she asked what kind? I responded oh just a paper signed by Judge McGowan, she responded by 'well I should but I don't think I will.' " (June 14, 1984; E1:168)

April 28, 1984, was 20 months after Mrs. Sim was sued for guardianship.

(50) At no time during the proceedings in the county court did Mrs. Sim call Harvey A. Neumeister as a witness to testify on her behalf. Instead, during the trial, the half-sisters themselves called Mr. Neumeister

to the witness stand and introduced his affidavits into evidence. (March 22, 1984; 134:5-6. June 14, 1984; 240:22-24)

(51) The Nebraska guardianship statute does not obligate Mrs. Sim to appear in court or to testify. However, the Nebraska Supreme Court creates and imposes a new legal obligation on Mrs. Sim to appear in court and testify that she is not incompetent. See p. 7a, and 28a, infra.

(52) On July 6, 1985, the County Court of Otoe County appointed Alan M. Wood as guardian and conservator. Mrs. Sim had never met or seen or heard of Mr. Wood before his appointment over her. (March 22, 1985; 62:7-8) The limitation of the guardian's power does not justify the appointment of a guardian in the first place.

THE QUESTIONS ARE SUBSTANTIAL

(1) Maude Clevenger Sim as an elderly person "is not the mere creature of the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

(2) In 1985, there were 28,609,000 people in the United States who are age 65 or older, of which there were 6,198,000 people who are age 80 or older. It is estimated that in the year 2025 there will be 58,771,000 people in the United States who are age 65 or older. U.S. Bureau of the Census, *An Aging World (Advance Report)* 3, 7 (1987).

(3) The fight of elderly people against guardianship is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n.*, 219 U.S. 498, 515 (1911).

> "Unfortunately, the record of the legal profession in providing services to the mentally ill has been grossly inadequate. . . . First, the principle of "out-of-sight, out-of-mind" appears directly applicable, as mentally handicapped individuals are egregiously underrepresented in all phases of the legal process and are rarely afforded specialized counsel. Those few handicapped persons who do have counsel are afraid

of "rocking the boat" . . ." Perlin and Sadoff, "Ethical Issues in the Representation of Individuals in the Commitment Process," 45 *Law and Contemp. Prob.* 161-62 (1982).

(4) Elderly people have the right of self-determination to enter a nursing home and to establish a durable power of attorney and an irrevocable trust to take care of themselves and their property as they grow older. Elderly people have the right to establish their own private legal arrangements to carry out their own rational life plan for the rest of their life. When elderly people have their own private legal arrangements, there is no need or justification for the state to put them under guardianship. Elderly people have the right to be treated with dignity and self-respect rather than being subjected to the humiliation and cost of guardianship. Elderly people have the right to have their own wishes and choices honored rather than being overridden.

See the joint project of the ABA Commission on Legal Problems of the Elderly and the ABA Commission on the Mentally Disabled, as reported in Pickering and Wexler, "Life Services Planning: Counseling elderly and disabled clients," *American Bar Association Journal* 102 (January 1, 1987).

(5) Constitutional rights begin with the individual, not the state. It is the individual who is the source of constitutional authority in our system of self-government. No person ever delegates any authority to the state to put him under guardianship when he has already taken care of his own health and welfare and property through his own private legal arrangements.

(6) The Due Process Clause of the Fourteenth Amendment protects substantive rights. The Due Process Clause imposes substantive restraints and limitations against the government. At every stage of the guardianship proceeding, the Due Process Clause stops the government from engaging in any violation of Mrs. Sim's privacy or her liberty or her property or her self-determina-

tion when there is no permissible purpose, there is no compelling justification, for the state action.

(7) The Nebraska Supreme Court decision in Mrs. Sim's case conflicts with the principle of *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In *O'Connor v. Donaldson*, the United States Supreme Court held that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." 422 U.S. at 575. Even though a person is mentally ill, the "State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576. Even though a person is mentally ill, when he is nondangerous he has the constitutional right to have his liberty preserved by his own private arrangements in which he is taken care of by family or friends or responsible third persons. Like Mr. Donaldson, Mrs. Sim is "locked up" when her rights are taken away from her.

Mrs. Sim has the same constitutional rights as Mr. Donaldson. Mrs. Sim has already exercised her right to take care of herself and her property for the rest of her life through her own private legal arrangements. Thus a mere finding of incapacity alone is insufficient to justify putting Mrs. Sim under guardianship. Even though Mrs. Sim might be found to be incapacitated, there is "nothing more" in her particular case to suggest that she and her property are not "living safely in freedom" under her own durable power of attorney and irrevocable trust. There is no probable cause to believe that Mrs. Sim's private legal arrangements are not continuing to work perfectly just as she planned they would five years ago. Because there is no evidence whatsoever of any harm to Mrs. Sim or her property, the guardianship law is unconstitutional as applied to her particular case.

(8) The Nebraska Supreme Court decision in Mrs. Sim's case conflicts with the principle of *Conservatorship of the Person and Estate of Early*, 35 Cal. 3d 244, 197 Cal.

Rptr. 539, 673 P.2d 209 (1983). Following *O'Connor v. Donaldson*, the California Supreme Court held that the question in conservatorship is not whether a person is capable, acting by himself, unassisted by others, of making all the decisions that are necessary to take care of his health and welfare. The law is not designed "to force the person proposed for conservatorship to pass a theoretical test of ability" to take care of himself and his property alone. 673 P.2d at 212.

> "[I]n modern society no one lives completely independently of everyone and everything. . . . We agree with *Wilson* that it is unreasonable to force the conservatee to prove that he or she is capable of an entirely independent existence and suggest there are few members of the general public who are capable of such an existence. We all depend, to varying degrees, on the assistance of others (e.g., parents, mechanics, the farmer, the tailor) to make our way in the world. Where willing and responsible others are able to assist a person in providing his or her basic personal needs the person is not, in our view, 'truly unable to take care of [himself].' " 673 P.2d at 212-13.

Even though a person is mentally disabled, the State of California has no legitimate state interest in putting the person under conservatorship when his own basic needs and care "can be provided through the good offices of family and friends." 673 P.2d at 213.

(9) Because the Nebraska guardianship statute interferes with Mrs. Sim's exercise of her fundamental rights, including her liberty and property, the statute must be subjected to the strict scrutiny standard of judicial review. The burden then shifts to the State of Nebraska to advance a compelling justification on behalf of the statute. But the State of Nebraska cannot show a compelling justification to put Mrs. Sim under guardianship. (a) The Nebraska guardianship statute itself contains many provisions, such as Mrs. Sim's durable power of attorney, to avoid the necessity of guardianship and protective proceedings. Neb. Rev. Stat. Ch. 30, Art 26, General Comment (Reissue 1979). See p. 91a, infra. (b) The law of

trusts is that a trust may serve any lawful purpose. 1 A. Scott, *The Law of Trusts* §§ 1, 2.3-2.8, and 59 (3d ed. 1967).

(c) The standard, generally-accepted principle of estate planning for the elderly is that the establishment of a trust obviates the need for a guardian or conservator. See the positions taken by (i) the Committee on Estate and Tax Planning of the American Bar Association in "The Revocable Living Trust as an Estate Planning Tool," 7 *Real Property, Probate and Trust Journal* 223 (1972); (ii) the Committee on Persons under Disability of the Trusts and Estates Section of the New York State Bar Association in Callahan, "The Use of a Convertible Trust in Planning for Disability," 53 *New York State Bar Journal* 422 (1981); (iii) continuing legal education programs for lawyers, such as Regan, *Tax, Estate & Financial Planning for the Elderly* §§ 13.04[1]-[2] (Matthew Bender, 1985); and (iv) academic commentary, such as Wellman, "The New Uniform Probate Code," 56 *A.B.A. J.* 636 (1970), and McGovern, *Wills, Trusts, and Future Interests: An Introduction to Estate Planning* 260-61 (West, 1983).

(10) In *Matter of Forward*, 86 A.D.2d 850, 447 N.Y.S. 2d 286 (1982), the court held that "there is no need for the appointment of a conservator" over the property of an 88-year-old woman because she had already executed an irrevocable trust, with herself as the lifetime beneficiary, to provide for her medical and living expenses. "Thus, even in the event that her ability to care for her property were found to be substantially impaired, as alleged, the trust would continue in force and the care of her property would be assured for the duration of her life." *Id.* at 851, 447 N.Y.S. at 287. Following the *Forward* case, the Nebraska Supreme Court indicated that there would have been no need to appoint a conservator for Mrs. Sim if she had chosen a trust company to be her trustee rather than an individual. See p. 16a, infra. But the requirement that Mrs. Sim choose an anonymous trust company over her personal lawyer for 35 years, when there is no difference between them in terms of their responsibility, denies Mrs. Sim the equal protection of the laws.

(11) By establishing her own private legal arrangements, Mrs. Sim already fulfilled the only permissible purpose which the State of Nebraska has in enacting a system of guardianship. In accordance with Neb. Rev. Stat. §§ 30-2619, 30-2620, and 30-2630 (Reissue 1985), Mrs. Sim already made "responsible decisions" to establish the "means of providing continuing care" of herself and the "proper management" of her property, and thus it is not "necessary" to place her under guardianship or conservatorship. It is the wholly unnecessary application of the Nebraska guardianship statute to Mrs. Sim that makes the statute unconstitutional as applied.

(12) A guardian and conservator has total power over a protected person. See pp. 60a-90a, infra. But because the durable power of attorney and irrevocable trust are perfect substitutes for guardianship and conservatorship, all that state power does not add one thing to the private legal arrangements which Mrs. Sim already has. The State of Nebraska has never alleged that Mrs. Sim's own arrangements are not working for the purposes they were established.

(13) Mrs. Sim is both the settlor and the lifetime beneficiary of her own irrevocable trust. She has the right to establish her trust to serve any lawful purpose. She has the right to preserve the privacy of her trust. She has the right to place absolute trust and confidence in her trustee. She has the right to impose a fiduciary duty on her trustee to stop the State from breaking into the privacy of her trust to take any inventory and accounting while she is still living, unless there is probable cause to believe that the trust is not working for the purposes she intended.

The State claims that even in the absence of probable cause, the convenience of periodic accounting over a single accounting at the end of a trust outweighs any right an individual has to keep his affairs free from public scrutiny. But while having a universal rule of periodic accounting might have occasional benefits, the price is that every incompetent elderly person is forced to make a full public disclosure of his financial affairs, even though there is no probable cause. The price is too high and without justification. The Constitution protects the right of privacy over mere administrative convenience.

(14) Mrs. Sim has the constitutional right not to be subjected to a proceeding for guardianship by the State of Nebraska in the absence of any specific factual basis to support the petition for guardianship; in the absence of any probable cause hearing to restrain any unwarranted state action; and in the absence of any legitimate, compelling justification for the State to violate Mrs. Sim's privacy and liberty and property.

Mrs. Sim has the constitutional right to be presumed competent unless the State of Nebraska bears its burden of proving otherwise. However, the mere allegation of incompetence found in the petition against Mrs. Sim did not dispel that mandatory constitutional presumption. Thus Mrs. Sim was deprived of her rights without due process of law because the Nebraska guardianship statute makes the hidden unconstitutional presumption that she is incompetent just because a petition has been filed against her.

Contrary to the Nebraska Supreme Court, the Due Process Clause means more than notice. The Due Process Clause imposes substantive restraints against the state. A petition for guardianship could be definite and certain, and yet provide no permissible grounds for the State to proceed against a person. The Nebraska Supreme Court's "motion for a more definite statement" cannot reestablish Mrs. Sim's rights when they have already been violated.

The Nebraska Supreme Court decision is in conflict with *Goodner v. Lindley,* 721 P.2d 801 (Okla. 1986); the principle of *Doe v. Gallinot,* 657 F.2d 1017 (9th Cir. 1981), and *In re Gault,* 387 U.S. 1, 33 (1967); ABA Comm'n. on the Mentally Disabled, *Guardianship and Conservatorship: Statutory Survey and Model Statute* 91-92 (1979); and Discovery Rule 35 of the Nebraska Supreme Court.

(15) Mrs. Sim has the constitutional right to have the advice and assistance of her lawyers so that she will

know how to defend all of her other constitutional rights before the examination by the psychiatrist. Under Neb. Rev. Stat. § 30-2619 (Reissue 1985), the right to counsel means the right to be advised by counsel. Mrs. Sim cannot be forced to stand alone against the State at any stage in the proceeding where her lawyers' absence might deprive her of an understanding of her rights, and thus derogate from her right to a fair trial. *United States v. Wade*, 388 U.S. 218, 226 (1967).

(16) Once the County Court of Otoe County, Nebraska, declares that Mrs. Sim has the right to have a court reporter be present at her psychiatric examination to prepare an official transcript, and Mrs. Sim claims the vested right and volunteers to pay for the transcript, then Mrs. Sim has the right to be guaranteed that the State of Nebraska will discharge its obligation. Because the State of Nebraska bears the whole burden of proving that Mrs. Sim is incompetent, it is no justification for the State to try to excuse its failure to arrange for the transcript by claiming that (a) Mrs. Sim could have hired her own psychiatrist, or (b) Mrs. Sim could have taken the witness stand herself, when Mrs. Sim is under no pre-existing legal obligation to testify against herself. The Due Process Clause prohibits "fundamental unfairness in the use of evidence" where Mrs. Sim is deprived of a transcript which would allow her attorneys to cross-examine the psychiatrist. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

J. Patrick Green
2500 California Street
Omaha, Nebraska 68178
(402) 280-2872

Counsel for Appellant

APPENDICES

APPENDIX A

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE CLEVENGER SIM.

MAUDE CLEVENGER SIM, APPELLANT, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES.

IN RE ESTATE OF MAUDE CLEVENGER SIM.

MAUDE CLEVENGER SIM, APPELLEE, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES, ALAN M. WOOD, GUARDIAN AND CONSERVATOR, APPELLANT

403 N.W.2d 721

Filed April 10, 1987. Nos. 85-422, 85-922.

1. **Guardians and Conservators: Appeal and Error.** The district court's and Nebraska Supreme Court's scope of review and proceedings to appoint a guardian or a conservator is for error appearing on the record made in the county court.

2. **Constitutional Law: Legislature: Presumptions.** Attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality.

3. ———:———:———. The presumption of constitutionality continues until the statute under review clearly appears to contravene some constitutional provision.

4. ———:———:———. Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity.

5. **Guardians and Conservators.** One may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe there will be more left for them if the owner is not free to deal with the property as he or she chooses.

6. ———. A conservator may be appointed for one who, because of advanced age, is unable to manage and will therefor waste or dissipate his or her property unless proper management is provided.

7. ———. Each case seeking the appointment of a guardian or conservator must be determined upon its particular facts, the question being whether the record is such as to establish that the statutory grounds for appointment of a guardian or conservator exist.

8. **Actions: Pleadings.** The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action.

9. ———:———. The failure to make a timely demand for a more definite statement from a petitioner waives the right to such a statement.

10. **Constitutional Law: Guardians and Conservators: Mental Health.** The subject of a proceeding to determine the need for a guardian or conservator has no fifth amendment right to remain silent during the course of a psychiatric examination.

11. **Trusts: Accounting.** No trust instrument can relieve a trustee from a duty to account to interested persons.

Appeal from the District Court for Otoe County; RAYMOND J. CASE, Judge. Judgment in No. 85-422 affirmed as modified. Appeal in No. 85-922 dismissed.

Harvey A. Neumeister, Kent J. Neumeister, and J. Patrick Green, for appellant Sim.

Richard H. Hoch of Hoch & Steinheider, for appellees Wright and Comiskey.

Alan M. Wood, guardian and conservator.

Robert M. Spire, Attorney General and Ruth Anne Evans, for amicus curiae State.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

Caporale, J.

I. INTRODUCTION

These cases, which were consolidated for argument on the court's own motion, arise from a petition by Edith R. Wright and Opal C. Comiskey to have a guardian and conservator appointed for their 87-year-old half sister, Maude Clevenger Sim, with whom they share a common father. The cases constitute the third and fourth appearances of this matter in this court. In the first appearance, *Sim v. Comiskey,* 216 Neb. 83, 341 N.W.2d 611 (1983), we affirmed the district court's dimissal of the effort by Sim's attorneys to enjoin the county court proceeding which ultimately led to the designation of Alan M. Wood, a member of the bar of this state, as Sim's guardian and conservator with limited powers, a designation the district court later affirmed but modified by eliminating the limitations, and now appears before us the third time as case No. 85-422, *In re Guardianship and Conservatorship of Maude Clevenger Sim.* In the second appearance, *In re Guardianship and Conservatorship of Sim v. Comiskey,* 216 Neb. xxvi (case No. 83-873, Jan. 23, 1984), we dismissed as premature (that is, for lack of jurisdiction) the appeal taken by Sim's attorneys from an order of the county court which appointed physicians to examine Sim. In the remaining, or fourth, appearance, case No. 85-922, entitled *In re Estate of Maude Clevenger Sim,* the designated guardian and conservator appeals the district court's refusal to issue letters of appointment. For the reasons hereinafter discussed, we affirm as modified the judgment of the district court in case No. 85-422 and dismiss as moot the appeal in case No. 85-922.

II. FACTS

In the summer of 1981, Wright began to see Sim lose her train of thought, and in May of 1982 saw Sim's mental capacities diminish further. For example, when Wright and Sim were watching a television evangelist, Sim arose from the davenport and, referring to the television program, announced, "He's going to kill me. He's going to kill me. Help, they're going to put me up as a sacrifice." As another example, Sim would light the electric stove, forget to turn it off, and burn up whatever had been placed thereon. By July of 1982, Sim could hardly recognize where she was going. She would get lost very easily, including in the grocery store. Sim would tell Wright that she was going to a certain place, but would head in the other direction. Sim would say, "I'm going to the bathroom" and then get lost behind the French door in the living room.

Robert S. Comiskey is married to Joan Comiskey and is the son of Opal Comiskey, notwithstanding the fact he testified that Sim was "the only mother I've ever had." Robert and his wife had apparently lived with "Aunt Maude" since 1975. Robert performed simple maintenance around the house, mowed the lawn, and painted; Joan cooked, drove, and occasionally did Sim's laundry. Sometime in June of 1982, Wright suggested that she and her husband, Vance, move in and take over the job of caring for Sim.

Sim fell and injured her hip and elbow on June 25, 1982. She was taken to St. Mary's Hospital in Nebraska City and, in addition to the injuries, was provisionally diagnosed as having organic brain syndrome. The medical reports show that she had been deteriorating mentally. Family members reported that Sim had been having hallucinations but that her prescribed medication, Haldol, had been helping. Sim was finally diagnosed as having parkinsonism, among other things. Parkinsonism is the condition characteristic of Parkinson's disease, a neurological disorder usually due to arteriosclerotic changes in the basal ganglia of the brain, and marked by muscular tremors, droopy posture, rigidity, and a masklike facial expression. 3 J.E. Schmidt, Attorneys' Dictionary of Medicine and Word Finder P-51 (1987). Sim's discharge summary of July 6, 1982, also reports that she "was confused off and on" and that "[s]ometimes she didn't even remember her sister's name when she was in the room or the doctor's name." Sim was transferred to Clarkson Hospital in Omaha to see a neurologist. The July 6, 1982, discharge summary also shows that "[t]his was requested partly by the family and partly by Mr. [Harvey] Neumeister, a lawyer friend of hers." A computerized axial tomography (CAT) scan revealed the presence of Alzheimer's disease, a form of mental deterioration marked by a wasting of the cortex of the brain and the development of argyrophil plaques. 1 J.E. Schmidt, *supra* at A-159. The discharge summary further states that Sim's "prognosis is poor as far as the Alzheimer's with gradual deterioration. She has organic brain syndrome and needs somebody to keep an eye on her." On July 2, 1982, one of Sim's half sisters discussed with Sim's doctor the possibility of applying for appropriate guardianship. The doctor's notes from July 2, 1982, indicate that the doctor thought that was very reasonable.

When Sim left the hospital and returned home, Opal Comiskey stayed with Sim to care for her needs. Opal Comiskey had the locks changed on or about August 5, 1982, "to keep Joan [Comiskey] from running in and out whenever she chose." According to Opal Comiskey, Harvey A. Neumeister "had charge of" Sim's money already, at this time, and Opal Comiskey would sometimes have to use her own money to buy groceries for Sim.

A few days after Opal Comiskey was no longer able to care for Sim, another friend, Helen Gladys Parks Beccard, who was herself then 89 years old, came to care for her.

Sim was taken to Duff's Nursing Home in Nebraska City on August 10, 1982, by Joan Comiskey, Gladys Beccard, and perhaps Margaret Kreifels. The nursing home was told to send the bills to Harvey Neumeister. Harvey Neumeister regularly called upon Sim at the nursing home and conferred with the nursing home about the care Sim was receiving and the care she might need. Opal Comiskey was not informed that Sim had been taken to a nursing home and did not know Sim's whereabout for 2 weeks, when she read about Sim in the nursing home news. In fact, Opal Comiskey was kept from visiting Sim until more than 1 month after she and Wright, on September 3, 1982, petitioned for the appointment of a guardian and conservator for Sim on the basis that because of physical disability and advanced age, Sim could not take care of herself or her assets. Following that filing, on application of the half sisters, the court issued an order certifying that there were no restrictions on visiting Sim.

The county court set a hearing on the petition for September 24, 1982, appointed a provisional guardian ad litem for Sim, and appointed a physician to examine Sim and submit a report to the court. Before the hearing could be held, however, Harvey A. Neumeister and his son, Kent J. Neumeister, appeared as Sim's attorneys and initiated a number of steps which prevented the orderly progress of the proceeding. These steps included the writing of letters, bearing only Harvey Neumeister's signature, advising the guardian ad litem and physician that Sim did not recognize their authority and would not cooperate with them; the bringing of simultaneous actions in both the county and district courts to enjoin the proceeding on the ground the relevant statutes are unconstitutional; and suing the half sisters, judges, sheriffs, attorney for the half sisters, the court-appointed guardian ad litem, and the court-appointed physician.

At no time, however, was an answer filed alleging that Sim was competent, nor did Sim ever appear and testify that there was no need for a guardian or conservator.

The guardian ad litem met with Sim at the nursing home on September 21, 1982. Sim indicated

> that she didn't feel that she was incompetent and that she didn't need or want the two sisters or either of them appointed for her as guardian and conservator, and that Mr. [Harvey] Neumeister had been taking

> care of her things for her and that she felt that he could continue to do that for her.

The guardian ad litem nonetheless was of the opinion that the interview showed the need for a guardian or a conservator to care for Sim's affairs.

On October 7, 1982, Sim signed a joint tenacy warranty deed which conveyed her home in Nebraska City to Robert and Joan Comiskey in consideration of $1 and love and affection. The $25.85 transfer tax stamp affixed November 5, 1982, suggests, however, that the actual value of the property involved in the transaction was $23,500. The deed also recites that "[t]his deed by gift voids in my Will dated May 13, 1980, Paragraph SECOND #10 . . . ."

Sim executed a second warranty deed on October 7, 1982, which conveyed four pieces of realty in Nebraska City to "Harvey A. Neumeister, Trustee," with additional language, neither typed nor in Sim's handwriting, which states, "if necessary, Kent J. Neumeister as alternate trustee or successor trustee."

Alba (sic) B. Neumeister, Harvey Neumeister's wife of over 50 years and stenographer for more than 40 years, testified in response to questioning by her son, Kent Neumeister, using notes he had typed, that she has known Sim for over 40 years and that on October 7, 1982, she picked up Sim from the home, drove her to Lincoln, ate lunch with her before the documents and deeds were executed, and took her shopping after the documents and deeds were executed. Mrs. Neumeister's testimony concerning the signing of the documents shows that the only people present were herself; her husband; Willaim (sic) Walker, an attorney now deceased; Sim; and the notary public, Don

G. Renner. Mrs. Neumeister also testified that her husband asked Sim whether she understood what she was signing, but did not give any testimony as to Sim's response to that question. Mrs. Neumeister did state that Sim "followed those documents that she signed, that trust agreement and those deeds that she signed—or one deed that she signed, and also the transfer of the car. She could read those. She had her mentality at that time."

Harvey Neumeister later testified that his wife forgot about the second deed to himself as trustee of three (sic) pieces of property.

Harvey Neumeister testified that he is Sim's lawyer and also acts as her trustee. He drafted the trust instrument which named himself as trustee, and further drafted two instruments which purportedly gave himself power of attorney for Sim. His testimony is that his power of attorney "couldn't be any broader" and that the trust instrument contained no duty for the trustee to account to anyone. These documents were also purportedly executed by Sim on October 7, 1982.

Don G. Renner attested that when he notarized Sim's signatures on the various documents on October 7, 1982, he "did not have any discussion with Mrs. Sim regarding the instruments being executed, did not inquire about them, and cannot testify or affirm whether or not Maude C. Sim knew anything about the documents or was competent to understand them and realize what she was signing . . . ."

Sim remained at the nursing home until August of 1983. On August 29, 1983, Otoe County Judge Eugene Atkinson appointed two Bellevue physicians to examine Sim. Two days after the order was entered, Robert Comiskey removed Sim from the nursing home, and she never returned there. Harvey Neumeister admitted he knew the court entered the order which appointed the two doctors to examine his client. Kent Neumeister, however, took the position that the order was written on August 29, 1983, but not filed until August 31, 1983, and that it was addressed to the doctors but neither to Sim's attorneys nor to Robert and Joan Comiskey. Kent Neumeister thus concluded "that if Judge Atkinson doesn't know how to make out an order, that's not our fault." On October 26, 1983, Harvey Neumeister called Duff's Nursing Home and said that "they were dismissing Maude effective 10-31 and would pick up all of her belongings." Harvey Neumeister later testified that Sim's removal from the nursing home was a decision made by her lawyers that she was not going to be examined by the doctors. His basis for violating the court order was that "this has been an unconstitutional thing."

Sim moved in with Robert Cominskey on August 31, 1983, and fell and broke her hip sometime prior to October 2, 1983, when she was taken to a hospital in Lincoln, where she remained until around January 8, 1984.

Samuel Hofer, the pastor at the Presbyterian church where Sim had been worshipping for 27 years, visited Sim at Duff's Nursing Home in July or August of 1983. He tried to visit her again at Christmas to present a gift but was told that she had left the nursing home. The clergyman unsuccessfully attempted to locate her at other nursing homes in town. He called Joan Comiskey and was told that he would have to learn Sim's whereabouts from "Mr. Neumeister." The clergyman made 15 or 20 unsuccessful attempts to contact one of the Messrs. Neumeister.

Harvey and Kent Neumeister continued to hide Sim for more than half a year, refusing to disclose her whereabouts to Sim's half sisters, to her pastor, or to the court. On March 22, 1984, Harvey Neumeister finally answered the court's inquiry and revealed that he had moved Sim to Milder Manor in Lincoln.

The court then, through Judge Robert C. McGowan, appointed Dr. Emmett Kenney to examine Sim, and instructed counsel not to interfere with the psychiatric evaluation. The court further stated that "[i]f somebody wants a reporter there to record it, it's all right with me. I don't care. But there are not going to be any attorneys participating in this thing. It's a medical question at this point . . . ."

Dr. Kenney examined Sim for about an hour on April 28, 1984, to see if a mental illness was present that would interfere with Sim's capacity to act in her own best interests. The doctor identified himself to Sim as a court-appointed physician and psychiatrist, and explained to her that this was a special examination and that the result of it would not be confidential because there would be a report to the court. No court reporter was present during the interview.

The doctor testified that he made specific inquiries and that Sim made some specific answers. When asked three times when her birthday was, Sim responded that it's true, that she was going, and "with the girls." When asked where she lived, Sim responded that she lived mainly on the Lincoln trail, and answered that the building she was in was "plastic and ring way." She gave the current date to be April 3, 1886. She evaded a question as to the cost of a loaf of bread but finally answered 25 cents. She priced a quart of milk at 20 cents. When asked if she had any relatives, Sim responded that she had "half of an umbrella." When asked with whom she was living, she responded, "Rolled oats high cut."

The doctor's opinion was that Sim had an organic brain syndrome which adversely affected her judgment, orientation, memory, affect, and cognition. The doctor stated that while Alzheimer's would cause an organic brain disease, he doubted that the previous diagnosis of Alzheimer's was correct. His own opinion was that Sim suffered from an organic brain disease that affected her judgment, memory, and cognition, and that her mental condition left her "vulnerable to exploitation."

Robert Comiskey, called on Sim's behalf, was asked at the June 14, 1984, hearing, "I want to know if you feel [Sim] can handle her affairs today." His answer was, "Today? Right now, at this moment, quite honestly, no." Even Harvey Neumeister, at the same hearing, when asked, "Do you think today, Mr. Neumeister, that Maude can handle her own affairs?" answered, "I think she needs help."

III. JUDGMENTS APPEALED

1. Case No. 85-422

The county court found it was necessary to appoint a guardian and conservator for Sim and designated Wood as such, directing that, until further order, his authority as guardian be limited to monitoring Sim's condition at Milder Manor in Lincoln, reporting Sim's condition quarterly to the court, setting aside any restrictions on rights of visitation with her, and waiving on Sim's behalf any statutory or other privileges as to confidential communications. Wood's authority as conservator was, pending further order, limited to obtaining a copy of the power of attorney and trust agreement, and procuring an accounting, pursuant to Neb. Rev. Stat. ch. 30, art. 28 (Reissue 1985), of all assets Harvey Neumeister claims to hold as trustee for Sim and of all rceipts and expenditures as trustee.

Sim's attorneys promptly appealed the county court's order to the district court, which affirmed but modified the county court judgment by removing all limitations on the authority of the guardian and conservator. Sim's attorneys have appealed the district court's judgment to this court.

2. Case No. 85-922

Since Sim's attorneys had appealed the county court's judgment in case No. 85-422 to the district court before the county court had the opportunity to issue letters of appointment to Wood, the county court, concluding it had lost jurisdiction, denied Wood's application for such letters. Wood then, in the district court appeal taken by Sim's attorneys and which constitutes the subject matter of case No. 85-422, applied for such letters from the district court. The district court denied the application on the ground that since Wood had not appealed from the county court's refusal to issue the letters, the district court lacked jurisdiction. Wood has appealed that district court judgment to this court.

IV. ANALYSIS OF CASE NO. 85-422

We concern ourselves first with case No. 85-422, in connection with which Sim's attorneys assign 12 errors.

We begin by noting that, like the district court, our scope of review is for error appearing on the record made in the county court. *In re Estate of Oltmer,* 214 Neb. 830, 336 N.W.2d 560 (1983); Neb. Rev. Stat. § 24-541.06 (Reissue 1985). See, also, *In re Estate of Michels,* 223 Neb. 286, 389 N.W.2d 285 (1986); *In re Estate of Wagner,* 222 Neb. 699, 386 N.W.2d 448 (1986); *In re Estate of Wagner,* 220 Neb. 32, 367 N.W.2d 736 (1985).

1. Need for Guardianship and Conservatorship

The first assignment claims that the courts below erred in failing to hold that "the guardianship law is unconstitutional as applied to the constitutionally protected conduct of Mrs. Sim because she has already fulfilled the only permissible purpose for guardianship by moving into a nursing home and establishing a durable power of attorney and an irrevocable trust with herself as the lifetime beneficiary."

In this connection Sim's attorneys argue in general terms that Sim is a person who has right to liberty, property, association, travel, privacy, a good reputation, and to due process and the equal protection of the laws. The question, however, is not whether Sim possesses those rights but whether the State of Nebraska has a legitimate interest in protecting Sim's person and property and whether it has asserted that interest in a constitutionally permissible manner.

In beginning the analysis of this assignment, it is appropriate to recall that attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality. *State ex rel Wright* *v. Pepperl,* 221 Neb. 664, 380 N.W.2d 259 (1986); *State v Mayhew Products Corp.,* 211 Neb. 300, 318 N.W.2d 280 (1982). This presumption continues until the statute under review clearly appears to contravene some constitutional provision. *Lenstrom v. Thone,* 209 Neb. 783, 311 N.W.2d 884 (1981); *Prendergast v. Nelson,* 199 Neb. 97, 256 N.W.2d 657 (1977). Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State v. Mayhew Products Corp., supra.*

The relevant statutes embody separate systems of guardianship to protect persons of minors and mental incompetents, and also include provisions for a type of power of attorney that does not terminate on disability of the principal, which adults may use when approaching senility or incompetence to obviate the need for other kinds of protective regimes. Neb. Rev. Stat. ch. 30, art. 26 general comment (Reissue 1985).

In presenting their position Sim's attorneys place heavy reliance on *Matter of Forward,* 86 A.D.2d 850, 447 N.Y.S.2d 286 (1982), a proceeding to appoint a conservator under the New York mental hygiene law. Therein, the proposed conservatee, an 88-year-old woman who resided with her family, had "recently executed an irrevocable trust" with a bank and trust company as trustee and herself as the lifetime beneficiary, to provide for her medical and living expenses. *Id.* at 851, 447 N.Y.S.2d at 287. The court noted that even if the woman's ability to care for her property were found to be substantially impaired, as the distributees had alleged, the trust would continue in force and the care of her property would be assured for the duration of her life. The court concluded that under the circumstances of that case there was no need to appoint a conservator, and there were no triable issues of fact which would alter the result. There are, however, a number of features which distinguish the present case from *Forward.* First, since the *Forward* court was able to describe the trust provisions, we must conclude that the court had the trust before it. In the present case we have before us only the drafter's representation concerning the existence of certain selected terms of the trust. Second, the absence of other triable issues of fact signals that there were in *Forward* no concerns that the settlor lacked capacity or made her own decisions. Third, as the county court in the present case noted, "The trustee in Forward was a trust company and the very brief opinion does not touch upon the subject of accounting. Apparently accounting was not a problem in Forward." Fourth, the *Forward* decision does not disclose whether the trust was executed before or after the conservatorship proceedings had been commenced.

Sim's attorneys also cite *Matter of Waxman,* 96 A.D.2d 906, 466 N.Y.S.2d 85 (1983), wherein an application to appoint a conservator was dismissed because, among other things, the appellant had "recently executed an irrevocable trust," with his attorney as trustee and himself as lifetime beneficiary for the purpose of providing for his lifetime medical and living expenses. *Id.* at 907, 466 N.Y.S.2d at 87. The *Waxman* court, however, remanded the proposed conservatee's counterclaim, which included issues of fraud, duress, and the unlawful withholding of property by his wife and her attorneys. Sim's attorneys failed to call our attention to the result on appeal after remand of that case. In *Matter of Waxman,* 110 A.D.2d 644, 487

N.Y.S.2d 381 (1985), the same court noted that the previous decision did not reach the validity of the inter vivos trust, and again remanded the case for hearing because of conflicting evidence as to Waxman's state of mind at the time of the trust's execution and as to whether Waxman had received a proper explanation of the trust, including a clause which waived the settlor's statutory rights to revoke the trust.

Sim's attorneys do not relate the dispersive constitutional attack they make under this assignment of error to any particular statutory provision employed in this proceeding; rather, they seem to assault the application of the entire guardianship and conservatorship statutory schemes to Sim on vaguely articulated grounds that the schemes violate portions of the federal Bill of Rights. Nothing has been called to our attention, nor do we find anything, which supports such an attack to the application of the pertinent portions of the statutory schemes to Sim. Accordingly, this assignment of error fails.

2. Certainty and Breadth of Standards

The second assignment of error declares the courts below erred in failing to declare that the various standards contained in "the guardianship law are overbroad and vague and fail to incorporate the least restrictive alternative as applied to the constitutionally protected conduct of Mrs. Sim."

To the extent pertinent to our inquiry, § 30-2619 provides:

> (a) The allegedly incapacitated person or any person interested in his or her welfare may petition

> for a finding of incapacity and appointment of a guardian. The petition shall be verified and shall contain allegations with regard to any of the areas as provided under section 30-2619.01 in which the petitioner claims that the allegedly incapacitated person lacks sufficient understanding to make or communicate responsible decisions concerning his or her own person.

The "areas" contained in § 30-2619.01, to which § 30-2619 refers, concern the

> allegedly incapacitated person's ability to make, communicate, or carry out responsible decisions concerning his or her person with regard to:
>
> (1) Selecting his or her place of abode within or without this state;
>
> (2) Arranging for his or her medical care;
>
> (3) Protecting his or her personal effects;
>
> (4) Giving necessary consents, approvals or releases;
>
> (5) Arranging for training, education, or other habilitating services appropriate to him or her;
>
> (6) Applying for private or governmental benefits to which he or she may be entitled;
>
> (7) Instituting proceedings to compel any person liable for the support of the proposed ward to support him or her if no conservator has been appointed for the proposed ward;
>
> (8) Entering into contractual agreements if no conservator has been appointed for the proposed ward;
>
> (9) Receiving money and tangible property deliverable to him or her and applying such money and property to his or her expenses for room and board, medical care, personal effects, training, education, and habilitative services; and

> (10) Any other area of inquiry which the court may direct.

The relevant portions of § 30-2630 provide:

> Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:
>
> . . . .
>
> (2) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person if the court determines that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, . . . or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided . . . .

While we have held that one may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe there will be more left for them if the owner is not free to deal with the property as he or she chooses, *In re Estate of Wagner,* 220 Neb. 32, 367 N.W.2d 736 (1985), it is clear that a conservator may be appointed for one who, because of advanced age, is unable to manage and will therefore waste or dissipate his or her property unless proper management is provided. *In re Estate of Oltmer,* 214 Neb. 830, 336 N.W.2d 560 (1983).

In reliance upon *O'Connor v. Donaldson,* 422 U.S. 563, 576, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975), Sim's attorneys first argue that a state "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.'' The present case does not, however, deal with the commitment with which *O'Connor* concerned itself and which the U.S. Supreme Court termed a ''massive curtailment of liberty.'' *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972).

Sim's attorneys have presented no legal authority which requires the use of a ''least restrictive alternative'' in a guardianship and conservatorship proceeding such as is at issue in the present case. Indeed, the U.S. Supreme Court imposed no such requirement even when dealing with the substantive rights of involuntarily committed mentally retarded individuals under the 14th amendment to the U.S. Constitution. In *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), the U.S. Supreme Court concluded that an involuntarily committed mentally retarded person's liberty interests required only that, in addition to food, shelter, clothing, and medical care, the state provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint, and recognized that in determining what is ''reasonable,'' the courts ''must show deference to the judgment exercised by a qualified professional.'' *Id.* at 322. An application of the *Youngberg* principles is found in *Mental Health Ass'n v. Deukmejian*, 186 Cal. App. 3d 1531, 233 Cal. Rptr. 130 (1986), *modified* 187 Cal. App. 3d 212A, 233 Cal Rptr. 130, *review denied and ordered not to be officially published* (Cal. Mar. 5, 1987).

Sim's attorneys further contend that the conservatorship statute is vague and overly broad. In arguing that the "necessary or desirable" standard of § 30-2630(2)(ii) and the phrase "the person is unable to manage his or her property and property affairs effectively" in § 30-2630(2)(i) are overbroad, they rely on *In re Boyer*, 636 P.2d 1085 (Utah 1981). In doing so, they characterize *Boyer* as a case where the Supreme Court of Utah "reviewed the constituionality [sic] of the Utah guardianship law which contains standards identical to the guardianship law in Nebraska." Brief for Appellant Sim at 31. What Sim's attorneys fail to state is that in its constitutional review, the *Boyer* court (1) found that while the phrase "responsible decisions" admitted of a broad interpretation, it was *not unconstitutionally vague* because it was limited to situations wherein the putative ward's decisionmaking process was so impaired that he or she would be unable to care for his or her personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and necessary medical care; (2) there was no "least restrictive alternative" requirement in a guardianship proceeding; (3) the guardianship statute *was not unconstitutionally overbroad;* (4) the flexibility available to a judge in tailoring a specific remedy to a specific individual lessens the potential for an overly broad deprivation of personal decisionmaking power; and (5) evidence of incompetency must be established by clear and convincing evidence. While it is true the *Boyer* court reversed the appointment of a guardian, it did so not because of a constitutional infirmity but because there was no clear and convincing evidence of incompetency.

There is no merit to this assignment of error.

3. Prepetition Decisions

The third assignment of error asserts that the lower courts erred in failing to interpret "the guardianship law in a way that is consistent with the only constitutional purpose for guardianship so that Mrs. Sim is not 'incapacitated' when she has already made 'responsible decisions' concerning her own person and property."

The key flaw in this assignment is the word "already," because although the record shows that Sim had entered a nursing home before the petition was filed, there had been no decisions "already made" concerning her property. Moreover, the record does not disclose that Sim herself made the decision to enter a nursing home. Another flaw is found in the use of the word "responsible," which refers not only to the method used in the decisionmaking process but to the quality of those decisions as well. The conveyances, trust, and powers of attorney were signed after the subject proceeding was initiated, under circumstances which leave us in doubt as to Sim's level of understanding of the nature and finality of her acts.

The constitutional arguments Sim's attorneys make in connection with this assignment of error have been addressed in the analysis of the first two assignments. As with those preceding assignments, this third claim is also without merit.

4. Sufficiency of the Evidence

In their fourth assignment Sim's attorneys state the lower courts erred in failing "to hold that, given a proper interpretation of the guardianship law, the determination that imposed guardianship and conservatorship on Mrs. Sim is contrary to the evidence in the case."

This court has long recognized that each case of this type must be determined upon its particular facts. *Hyde v. Crocker,* 185 Neb. 428, 176 N.W.2d 234 (1970); *Cass v. Pense,* 155 Neb. 792, 54 N.W.2d 68 (1952). In each case the question is whether the record is such as to establish that the statutory grounds exist to appoint a guardian or conservator.

The record outlined in part II of this opinion clearly and convincingly shows that at the relevant time, that is, at the time of the appointment of the guardian and conservator, *Hyde v. Crocker, supra,* Sim was, because of advanced age, suffering from a mental deficiency such as to render her unable to care for herself or to manage her assets. She is therefore an "incapacitated person" within the contemplation of § 30-2619. The record also clearly and convincingly establishes that Sim is incapable of demanding an accounting and is unable to understand any accounting her trustee might provide her. She is therefore, as more fully discussed in section 12 hereinafter, a person having property and property affairs which she cannot manage, thereby rendering her property vulnerable to waste and dissipation. Sim is therefore also within the contemplation of § 30-2630. Accordingly, there is no merit to this assignment of error.

5. Evidentiary Rulings

Sim's attorneys in the next, and fifth, assignment pronounce that the courts below erred in "overruling Mrs. Sim's defense against guardianship because they erroneously held that her properly admitted evidence had not been admitted into evidence."

We understand the argument in this connection to be that the county court erred in refusing to consider as having received in evidence certain of Harvey Neumeister's affidavits. It is true that in its judgment the county court observed that affidavits filed with the clerk but not received in evidence were not evidence. However, the county court judgment does not state that any particular affidavits had not been received. The record in fact reveals that a number of Harvey Neumeister's affidavits offered by the half sisters were received in evidence without objection and that those affidavits include Harvey Neumeister's representations that Sim had made the conveyance, had created the trust, and had granted him the powers of attorney as discussed earlier, in part II of this opinion. Those representations constitute the gravamen of the attorneys' defense to the appointment of a guardian and conservator. Thus, there is no substance to the claim that the "defense against guardianship" was prejudiced by the county court's holding that Sim's "properly admitted evidence had not been admitted into evidence." The attorneys' real complaint seems to be that the county court did not decide the case as they wanted it decided. That is a matter for this court to review and resolve, but there is no merit to this particular assignment.

6. Adequacy of Petition

In the sixth assignment of error Sim's attorneys contend that the courts below "erred in failing to hold that the guardianship law is unconstitutional because it allows orders to be issued against Mrs. Sim on the basis of a constitutionally defective petition for guardianship."

To the extent the argument in connection with this assignment differs from that presented in the next one, it is that a petition which is phrased in statutory terms is somehow constitutionally defective. Sim's attorneys cite no relevant authority in support of that position, and we find none. We note, however, that even in criminal cases, a complaint charging a crime in the words of the relevant statute is deemed sufficient. *State v. Wehrle,* 223 Neb. 928, 395 N.W.2d 142 (1986). Surely, then, a petition such as involved in this case, which is in the words of the relevant statute, is adequate in the absence of a motion for a more definite statement. The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action. See *Willis v. Rose,* 223 Neb. 49, 388 N.W.2d 101 (1986). The record in this case contains no motion for a more definite statement; under such circumstances, any right Sim's attorneys may have had for such was waived. *Lease Northwest v. Davis,* 224 Neb. 617, 400 N.W.2d 220 (1987). This assignment has no merit.

7. No Probable Cause Hearing

In their seventh assignment Sim's attorneys proclaim that there was error "in failing to hold that the guardianship law is unconstitutional because Mrs. Sim was denied the right to have a probable cause hearing after being served with the petition for guardianship."

The essence of the argument in this connection is that the guardianship and conservatorship statutes are flawed, in that they make no provision for a preliminary determination that the allegations of the petition are probably true before permitting an order for medical and psychiatric examinations. In the context of this case, however, the assignment presents a nonissue because Sim's attorneys prevented any examination for many months, and the examination, when finally conducted, established that the allegations of the petition as related to Sim's condition were correct. Under the circumstances, no further discussion is required to demonstrate that the subject assignment is without merit.

8. Conduct of Psychiatric Examination

In the eighth assignment Sim's attorneys aver that Sim was erroneously "deprived of her constitutional right to have the assistance of legal counsel before, during, and after her interrogation by the psychiatrist."

It is to be noted in the first instance that, as reflected in part II of this opinion, the county court only required that the attorneys not interfere with the psychiatric examination; no order prevented the attorneys from consulting with Sim either before or after the examination.

In essence, Sim's attorneys claim that her sixth amendment right to counsel was violated by their inability to be present during the course of the examination.

The difficulty with that position is that it is not supported by either legal authority or sound reasoning. It is true that the cases cited by Sim's attorneys, *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981); *Luna v. Van Zandt*, 554 F.Supp. 68 (S.D. Tex. 1982); *Lynch v. Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974), *reversed* 651 F.2d 387 (5th Cir. 1981); and *Lessard v. Schmidt*, 349 F.Supp. 1078

(E.D. Wis. 1972), *judgment vacated* 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974), *again vacated* 421 U.S. 957, 95 S. Ct. 1943, 44 L. Ed. 2d 445 (1975), hold that the subject of an involuntary civil commitment proceeding for mental illness, or one being transferred from prison to a mental hospital, is entitled to a due process hearing. None of those cases hold, however, that there exists a right to the presence of counsel during the course of a psychiatric examination. Indeed, *Lynch v. Baxley, supra,* requires only that the names of witnesses, including any examining physicians, be made available to counsel prior to any hearing and that counsel be permitted to inspect any documents or records pertaining to the case. In an analogous matter, the termination of parental rights, this court approved the receipt of evidence which was developed through interviewing the parents outside counsel's presence. *In re Interest of Spradlin,* 214 Neb. 834, 336 N.W.2d 563 (1983), *cert. denied* 464 U.S. 1011, 104 S. Ct. 533, 78 L. Ed. 2d 714.

For the reasons above stated we conclude there is no merit to this assignment of error.

9. Nonrecording of Psychiatric Examination

In this assignment Sim's attorneys urge that Sim was erroneously deprived of her right "to have an official transcript of her interrogation by the psychiatrist after the county court had declared her right, she was denied legal counsel, and she volunteered to pay for the transcript."

It must first be observed that in asserting the county court declared Sim had a right to a transcript of the court-ordered psychiatric examination, Sim's attorneys misrepresent the record. The county court did not declare any "right" to have the examination recorded or that he, the judge, wanted it recorded. The county court gratuitously offered Sim's attorneys an opportunity to have a reporter present if they wished. They told the court they would think it over for a while. Sim's attorneys later sent a letter to the judge to accept the offer. The court then wrote a letter to Dr. Kenney, which stated:

> "Please let me know when you plan to go [conduct your examination] and I will call the reporting service and make arrangements for the reporter to meet you at the nursing home."

Dr. Kenney testified that he has performed over 300 of these examinations for the courts and for the Veterans Administration, and never before had there been a court reporter present. Although the court contacted Dr. Kenney before he conducted the examination, he failed to have a reporter present.

Sim's attorneys argue that the absence of a verbatim transcript prejudices Sim's rights in a way that could not be remedied at trial. The fact of the matter, however, is that Sim's attorneys did not even try to refute Dr. Kenney's evidence. They could have arranged their own examination to dispute Sim's mental condition, or simply brought Sim into court to testify that she did not need a guardian or conservator. Sim's attorneys are unable to point to any prejudice that could not be remedied at trial. They had an opportunity to thoroughly cross-examine Dr. Kenney as to all of the events which occurred at the examination and about all of Sim's responses. The results of the examination are uncontroverted. Because of these factors, and because among the more than 45 pounds of paper comprising the record there is not a single answer denying Sim's incompetency, the failure to record the psychiatric evaluation must be viewed as harmless. Error without prejudice is not a ground for reversal. *Hennis v. O'Connor,* 223 Neb. 112, 388 N.W.2d 470 (1986); *Emery v. Mangiameli,* 218 Neb. 740, 359 N.W.2d 83 (1984).

10. Nature of Psychiatric Examination

In their 10th assignment Sim's attorneys allege that the courts below erred "in failing to hold that Mrs. Sim was deprived of her right to be warned that the confidential relationship she has with her regular doctor no longer applies when she is being examined by a court-appointed doctor, and that her statements can be used against her."

This assignment can be resolved quickly, for the characterization of the record by Sim's attorneys is not entirely accurate. While it is true that Dr. Kenney did not say to Sim in so many words that the statements she made could be used "against her," he did tell Sim, as stated earlier, in part II, that the examination was not confidential because there would be a report to the court. To suggest that such advice is not enough to inform one mentally capable of understanding that no confidential relationship exists and that what she said would be used in the proceeding is ludicrous.

11. No Right to Remain Silent

In this 11th assignment Sim's attorneys postulate there was error "in failing to hold that Mrs. Sim was deproved of her right to remain silent during the interrogation by the psychiatrist so that she is not compelled to be a witness against herself."

The argument made in support of this proposition rests principally upon *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L. Ed.2d 359 (1981), wherein the U.S. Supreme Court held that a court-ordered psychiatric examination to determine a criminal defendant's competency to stand trial, at which he was not warned he had a right to remain silent, could not be used in determining what penalty should be imposed. The *Estelle* Court ruled that the use of the examination, under the circumstances of that case, violated both the defendant's fifth amendment privilege against self-incrimination and his sixth amendment right to counsel, and thus overturned the imposition of the death penalty. The obvious and fundamental distinction between *Estelle* and the matter before us is that the present case is not a criminal one. In *Kraemer v. Mental Health Board of the State of Nebraska,* 199 Neb. 784, 261 N.W.2d 626 (1978), *cert. denied* 441 U.S. 960, 99 S. Ct. 2403, 60 L. Ed. 2d 1064 (1979), this court examined Neb. Rev. Stat. § 83-1059 (Reissue 1976), which prescribes the rules of evidence applicable to proceedings under the Nebraska Mental Health Commitment Act. In holding that *Miranda* warnings need not be given, the court stated: "In this case Kraemer was not charged with a crime, or even suspected of a crime. He was not being interrogated by a law enforcement officer, but by a doctor and the purpose was to determine, by medical diagnosis, his mental status." 199 Neb. at 795, 261 N.W.2d at 632. We have further held that where medical testing is required by law, there is no requirement in Nebraska that *Miranda* warnings be given.

There is therefore no merit to the effort of Sim's attorneys to impose the requirement that *Miranda* warnings be given prior to a psychiatric examination in guardianship and conservatorship cases. We have held that the *Miranda* rule applies to custodial interrogations by law enforcement officers of persons suspected of or charged with crime. See *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), which holds that there is no requirement that *Miranda* warnings be given prior to requesting a driver to submit to a chemical test of blood, breath, or urine. We have also held that absent questions which would subject a parent to criminal sanctions, a proceeding to terminate parental rights does not trigger the protection afforded by the fifth amendment against self-incrimination. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984), *cert. denied* 471 U.S. 1138, 105 S. Ct. 2680, 86 L. Ed. 2d 698 (1985).

12. Scope of Duties of Guardian and Conservator

In this 12th, and last, assignment, Sim's attorneys conclude that the "district court erred in granting the guardian and conservator unlimited power over Mrs. Sim and her property in violation of the requirement of the least restrictive alternative."

The question is not whether the district court violated any nonexistent "least restrictive alternative" requirement but whether there was any "error appearing on the record made in the county court" which the district court was authorized to correct.

When all is said and done, the overriding issue in this case is whether the record supports the county court's conclusion that a guardian is needed to oversee the care given Sim and to see to it that she is not denied access to visitors, and that a conservator is required to determine what has happened to her assets.

Prior to the designation of a guardian, Sim's attorneys secreted her and restricted her access to visitors. Since the purpose to be served by the guardianship is to see to it that Sim continues to receive appropriate care and is not hidden from her family, the restrictions imposed upon the designated guardian are appropriate.

In essence, the question in connection with the conservatorship is whether the trustee can be made to account. Harvey Neumeister, in his dual role as one of Sim's attorneys and as her trustee, argues he cannot be so required because the trust instrument provides that he need not account to anyone, presumably not even to Sim as the settlor. Such a position is untenable. Any notion of a trust without accountability is a contradiction in terms. If the trustee cannot be called upon to account, the settlor cannot force the trustee to any particular line of conduct with regard to the trust property, or sue for breach of trust. No trust instrument can relieve a trustee from a duty to account to interested persons. *In re Estate of Wallich*, 18 Utah 2d 240, 420 P.2d 40 (1966); *Wood et al. v. Honeyman et al.*, 178 Or. 484, 169 P.2d 131 (1946). See, also, *Fleener v. Omaha Nat. Co.*, 131 Neb. 253, 267 N.W. 462 (1936); Annot., 171 A.L.R. 631 (1947). Since Sim is in no position to demand or understand an accounting, it is legally right and proper that a conservator make that demand for her. For the present, then, it is appropriate that the conservator's authority be limited as the county court directed. What further authority the conservator may need, if any, will depend upon the outcome of the accounting.

Thus, while our perspective with respect to this assignment is different than that of Sim's attorneys, we nonetheless agree that there was no error on the record made in the county court; accordingly, the district court erred in modifying the county court's judgment.

V. DISPOSITION OF CASE NO. 85-422

For the reason hereinabove stated, we affirm but modify the district court's judgment by directing that court to affirm the county court's judgment and to remand the cause to the county court with the direction that the county court issue Wood letters of appointment consistent with its judgment.

VI. RESOLUTION OF CASE NO. 85-922

The foregoing disposition of case No. 85-433 renders case No. 85-922 moot. Accordingly, case No. 85-922 is dismissed.

VII. MOTION RE DISQUALIFICATION OF CERTAIN ATTORNEYS

There remains for disposition the motion filed by the Attorney General, who entered the case under the provisions of Neb. Ct. R. of Prac. 16A (rev. 1986) because of the constitutional questions raised, to disqualify both Harvey Neumeister and Kent Neumeister as attorneys for Sim. The half sisters and Wood joined in the motion, which is grounded on the claim that Canon 5, DR 5-101 and 5-102, of the Code of Professional Responsibility, prohibits members of our bar from at one and the same time acting as attorneys and testifying about substantive matters. While we do not wish to be understood as condoning any violation of our Code of Professional Responsibility, because the record supports the appointment of a guardian and conservator with or without the Neumeisters' participation as witnesses we overrule the motion without projudice to such disciplinary sanctions as may prove to be appropriate, if any, because of this and other questionable conduct in which each of Sim's attorneys may have participated.

JUDGMENT IN NO. 85-422 AFFIRMED AS MODIFIED.
APPEAL IN NO. 85-922 DISMISSED

APPENDIX B

IN THE DISTRICT COURT OF OTOE COUNTY, NEBRASKA

IN THE MATTER ENTITLED ESTATE OF MAUDE CLEVENGER SIM, PROTECTED PERSON.	)))))	DOCKET 31 PAGE 304 OPINION AND ORDER

(Filed March 18, 1985)

Now on the 1st day of February, 1985, the above entitled was before the Court for argument on appeal. Richard Hoch appeared as counsel for the petitioners and Kent Neumeister and Harvey Neumeister appeared as counsel for the objectors. Arguments were made and the matter submitted, the Court taking the same under advisement for review of the files and the briefs.

This action had its inception in the filing of a Petition on September 3, 1982, for the appointment of a guardian and conservator of the person and the estate of Maude Clevenger Sim by her two half sisters. At that time the Court appointed a guardian ad litem and physician in accordance with the statute.

The court-appointed GAL was supplanted by present counsel with approval of the Court on the theory that they were protecting the interests of the protected person. The fourth physician appointed by the Court was permitted to make an evaluation under threat of contempt of counsel and subsequently testified.

A series of pretrial motions, a declaratory judgment proceeding in the district court and the disqualification of the county judges of this district delayed the hearing on the merits until March 15, 1984. Additional hearings were held on March 26th and June 14th, and on the 6th day of July, the county court entered an Order appointing a guardian and conservator, limiting the authority of the guardian and conservator to monitoring the condition of the protected person and reporting to the Court on a quarterly basis, setting aside restrictions on visitation and to waive on her behalf any privileges as to confidential communications.

A series of pretrial motions was filed by both parties, the Court ruling on them in an omnibus hearing on August 26, 1983. The files have been marred by numerous filings of irrelevant and immaterial matters which have made the review difficult.

The petitioners filed their Petition under the provisions of NRS 30-2619 alleging that Maude Clevenger Sim was an incapacitated person who lacked sufficient understanding to make or communicate responsible decisions concerning her person.

The objectors filed a separate pleading directed to the appointed GAL and the appointed physician in an attempt to inhibit them from performing the statutory requirements. Further Answer was filed alleging that LB 428, enacted by the Second Session of the Legislature in 1982, was unconstitutional both on its face and as applied to her particular case.

The objectors, in argument and by affidavit, allege that the protected person has executed an irrevocable trust conveying her property to the trustee with full power to make decisions for her personal and health care, for the investing and protection of her property interests and with authority to convey property during her lifetime, and that the Petition for appointment is an invasion of her personal rights which have already been taken care of. It should be noted that the trust instrument, although not in evidence, was executed 34 days after the filing of the Petition for the appointment of a guardian and conservator.

The objectors have further attacked by motion the provisions of NRS 30-2619 as being overbroad, violation of due process and equal protection of the right to liberty, the right to property, the right to vote, the right to association, the right to travel and the right to privacy.

The petitioners introduced evidence, including expert testimony, the objectors relying on constitutional protections and the execution of a trust instrument which purportedly made provisions for the health, welfare and protection and disposition of Mrs. Sim's property. The trust instrument was never offered or admitted in evidence, the alleged incapacitated person never appeared in the courtroom or testified; the objectors arguing that the provisions of the trust agreement are privileged and that the trustee is accountable to no one other than the incapacitated person, despite the provisions of NRS 30-2806 et seq.

The county court found Mrs. Sim to be impaired by reason of senile dimentia to the extent that she lacked sufficient understanding or capacity to make or communicate responsible decisions concerning her person with regard to the secreting of her place of abode, arranging for her medical care, protecting her personal effects and giving necessary consents, approvals or releases. Further, that she cannot effectively manage or apply her estate to the necessary ends because she lacks the ability to do so by reason of senile dimentia.

This Court finds that the statutes providing for appointment of conservators or guardians of persons under disability establish a scheme through which legitimate governmental purposes are achieved through the least drastic means. The Nebraska guardianship and conservatorship provisions require a hearing before a tribunal applying definite and clearly established standards which neither inhibit nor stifle fundamental personal rights. The questioned statutes afford the opportunity to provide assistance to individuals who are not able to manage their person or property in a manner which does not unduly restrict liberty.

The Court further finds that the objectors have not met the burden of proof placed upon them of showing that the statutes amended by LB 428 are clearly unconstitutional. All statutes are presumed to be constitutional. See Otto v. Hahn, 209 Neb. 114, 306 NW2d 587 (1981). And it is not within the power of courts to declare a legislative enactment invalid unless the provisions contained therein clearly violate a fundamental concept of law or are in such extreme opposition to public policy that no other resort remains. See Prendergast v. Nelson, 199 Neb. 97, 256 NW2d 657 (1977).

This Court is of the opinion that the evidence fully supports a finding that Maude Clevenger Sim was an incapacitated person at the time of the filing of the Petition on September 3, 1982. The time elapsed since the filing of the Petition has now reached two years and eight months.

The objectors' attorneys have purportedly created a trust executed 34 days after the filing of the Petition herein and set up the creation and execution of the trust as a defense to the Petition; in addition, have secreted the whereabouts of her person so as to effectively prevent visitation by her family and have conveyed both real and personal property without consideration.

This Court is of the opinion that the objectors' attorneys are responsible for numerous delays in the filing of opposition papers in an effort to cause delay and prevent the petitioners from responding. This has had the effect of multiplying the litigation vexatiously and has not served the best interests of Maude Clevenger Sim.

The Court further finds that the Judgment of the county court should be affirmed but modified to the extent that the authority of the guardian and conservator not be limited or restricted in any manner in the performance of his duties as guardian and conservator.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Judgment as entered by the county court be and the same is hereby affirmed but modified in that no limitations or restrictions shall be placed on the authority of the guardian and conservator.

IT IS FURTHER ORDERED, ADJUDGED AND CONSIDERED by the Court that the matter be remanded to the Otoe County Court for the implementation of this Opinion.

Dated this 18th day of March, 1985.

BY THE COURT:

/s/ Raymond J. Case
District Judge

APPENDIX C

IN THE COUNTY COURT OF
OTOE COUNTY, NEBRASKA

IN THE MATTER OF THE) T-526
GUARIANSHIP AND)
CONSERVATORSHIP)
OF) ORDER
MAUDE CLEVENGER SIM)

The Petition for appointment of a guardian/conservator was filed on September 2, 1982 but, because of delay by some unsuccessful appeals, hearing was not commenced until March 22, 1984.

Thirty-four days later, and specifically on October 7, 1982, Mrs. Sim purportedly executed a durable power of attorney and an irrevocable trust to which she transferred title to substantially all, if not all, of her property. Harvey A. Neumeister is the attorney in fact, the trustee, and one of her attorneys in this proceeding. It is contended she was an incapacitated person at that time, and there is a question whether she was legally competent to execute such documents.

Two doctors were appointed by Judge Atkinson on August 29, 1983 to examine Mrs. Sim but their efforts to conduct the examination were thwarted at that time. Mrs. Sim was finally examined on April 28, 1984 by Dr. Emmet M. Kenney, a court appointed psychiatrist. His report and his testimony, corroborated by other witnesses, is very clear and convincing evidence that Mrs. Sim is now an incapacitated person and one who cannot effectively manage her estate to necessary ends. The evidence as to her condition at this itme is unrebutted. Mrs. Sim did not testify and no expert or other evidence was offered on her behalf.

Mrs. Sim's attorneys advanced three arguments in resistance to this action.

The first argument is the evidence does not prove she is an incapacitated person nor does it prove she cannot effectively manage her property. The evidence is clearly persuasive to the contrary.

The second argument is that if Mrs. Sim is an incapacitated person as defined by statute, and one who cannot effectively manager her estate, the appointment of a guardian/conservator is inappropriate because she has entrusted her affairs to Mr. Harvey A. Neumeister by execution of a durable power of attorney and an irrevocable trust.

There have been filed with the clerk of this court numerous affidavits purporting to contain excerpts of the trust agreement. These affidavits, unless received in evidence and made a part of the bill of exceptions, are not evidence before the court. BLANCO v. GMAC, 180 Neb. 365.

Upon specific inquiry by the court as to whether the power of attorney and trust agreement were to be offered in evidence, Mr. Harvey A. Neumeister declined to offer them in evidence because the contents are "confidential" between him and Mrs. Sim. This refusal to offer the documents as evidence is alone sufficient cause for the court to disregard them as an element of defense in this case. Documents, the contents of which one can only guess, are not evidence and should not be considered by the court.

With particular reference to the requested appointment of a conservator, and assuming arguendo that a valid trust has been created to manage her estate, the appointment of a conservator is nevertheless appropriate if only for accounting purposes.

It cannot be argued with a sense of true conviction that Mrs. Sim is now capable of receiving and understanding an accounting of the conduct of her affairs by Harvey A. Neumeister.

As late as July 1, 1984 Mrs. Sim's attorneys wrote a letter to the court asserting

> "But Mrs. Sim does not need to disclose the terms of her trust to anyone at any time. Mrs. Sim's trustee is bound not to disclose the terms of her trust, even to a court. That trustee can never break the confidential relationship he is bound to under the trust."

Every trustee has a duty to account. To put it another way, no trustee can be relieved of an obligation to account upon request of an interested person, and this is true even though the trust agreement is silent on that point or expressly provides that no accounting need be rendered.

> "We believe that the principal contention which appellants wish to submit under these two assignments of error is that the defendant was under no duty to account * * *
>
> It must be obvious that since a trustee administers the estate, not for his own benefit, but for that of the beneficiary, he must render his records available for the inspection of the beneficiary and supply the latter with information pertinent to the trust. The requests must, of course, be made at reasonable times. The reasonableness of the rule just stated becomes more apparent when we bear in mind the fact that the records, documents and account books which a trustee procures so that he can perform his duty do not belong to him personally, but are parts of the trust estate. The rule which authorizes the beneficiary to

inspect the trust records is essential in order that the beneficiary may be assured that he is obtaining the income or other advantages which the settlor intended . . .

The trust instrument . . ., however, contains the clause which says:

'The said trustee is hereby relieved from all obligations to account to the beneficiaries of this trust, or to any one, for any of the trust funds or income therefrom; the provisions above that receipts by the mother or custodian of said children shall fully acquit said trustee, and that having made payments to said mother or custodian, he shall not be further bound to see to the application of said trust funds or income, being merely for the guidance and protection of the trustee, and not obligatory on him, and he is hereby relieved from any duty of accounting whatsoever.' . . . * * *

If a fiduciary can be rendered free from the duty of informing the beneficiary concerning matters of which he is entitled to know, and if he can also be made immune from liability resulting from his breach of the trust, equity has been rendered impotent. The present instance would be a humiliating example of the helplessness into which courts could be cast if a provision, placed in a trust instrument through a settlor's mistaken confidence in a trustee could relieve the latter of a duty to account. Such a provision would be virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust. * * *

Bogert on Trusts and Trustees, 972, says: 'A settlor who attempts to create a trust without court accountability in the trustee is contradicting himself. A trust necessarily means rights in the cestui, enforcible, in equity. If the trustee cannot be called to account, the cestui cannot force the trustee to any particular line of conduct with regard to the trust

> property or sue for breach of trust. The trustee may do as he likes with the property, and the cestui is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the cestui must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach.'
>
> . . .
>
> We come now to an expression of our own views. We are completely satisfied that no trust instrument can relieve a trustee from his duty to account in a court of equity.'' Wood v. Honeyman, 178 Ore. 484, 169 P.2d 131 (1946)

I have no quarrel with the proposition that the appointment of conservator may be inappropriate where there is an existing trust. But the terms of the trust cannot be so confidential that the trustee need not account to a court appointed fiduciary of an incapacitated beneficiary who is unable to manage her property effectively for reasons of mental deficiency. The statutory duty of a trustee to account is not satisfied by an account to one incapable of making a valid judgment on the acts of the trustee.

If the matter of accounting is limited to an exchange of information between Mrs. Sim and Harvey A. Neumeister, Mr. Neumeister has, as stated in *Wood,* ''virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust.''

When a trustee attempts to excuse himself, because of a claimed confidential relationship, from his duty to account to some responsible person for the trustee's acts on behalf of an incapacitated person, the claimed right of confidential communication must yield to his duty to responsibly account.

The trustee cites Matter of Forward, 447 N.Y.S. 2d 286. The trustee in *Forward* was a trust company and the very brief opinion does not touch upon the subject of accounting. Apparently accounting was not a problem in *Forward.*

The trustee cites In re: Skinner's Guardianship, 300 N. W. 1 (Iowa) as authority for the same proposition. *Skinner* is not authority for this proposition. On the contrary, *Skinner* held that, even though property was in trust, the court had authority to appoint a guardian of the property of a child who was a beneficiary of the trust. The necessity of the appointment was not decided by the court.

The trustee cites Turner v. Ryan, 272 N. W. 60 (Iowa). It was held in that case

> "In so far as the property was concerned, its management and distribution was fully and completely provided for by the terms of the will, and the appointment of the trustee, *who was required to act under the orders of the court,* was for all essential purposes and in legal effect identical with that of a guardianship of the property". (Emphasis supplied)

The trustee cites STUDEBAKER v. HOGEN, 176 P. 339 (Wash.). The syllabus in that case is:

> "Where father by his will left his property to trustee to be used for the education of his minor children and the remainder to the children on their becoming of age, the appointment of a guardian of the estate of the children was improper; the children having no property needing the attention and care of a guardian."

The distinction in *Studebaker* is the trustee was a testamentary trustee who was subject to the jurisdiction of the court. Mr. Neumeister does not acknowledge jurisdiction of the court over his trust. Its terms and his administration of it are, according to him, confidential between him and Mrs. Sim.

The trustee cites an article "The Use of a Convertible Trust" in the New York State Bar Journal, October, 1981.

The article contemplates a competent settlor creating a revocable trust which, in the event the settlor becomes mentally incompetent to handle his affairs, becomes an irrevocable trust. The focus of the article is on economy, simplicity and flexibilty.

The article is absolutely silent on the issue of accountability of the trustee. Presumably the author assumed the settlor, while competent, could exact an account from the trustee. The article does not suggest the duty to responsibly account vanishes with the onset of incompetency of the settlor. In fact, the word "account" is not even in the article.

The trustee's third defense is that L. B. 428, which appears as sections 30-2619 to 30-2619.04 inclusive, sections 30-2620, 30-2620.01, 30-2624, 30-2625, 30-2627, 30-2628, 30-2630, and 30-2633, R. S. Supp. 1982 is unconstitutional.

The trustee argues "The failure of L. B. 428 to incorporate the least restrictive alternative proves (a) "that the statutory scheme is overbroad and void for vagueness, and (b) that the statute is thus based on at least one purpose of presumption which is unconstitutional in nature." (Page 20 of Otoe County District Court brief in No. 30-271).

Utah, like Nebraska, is a Uniform Probate Code state. Our Sec. 30-2628 as enacted in 1974 is the same as Sec.

75-5-312 of the Utah Probate Code. The section deals with the general powers and duties of a guardian of an incapacitated person.

Our Sec. 30-2601 (1) which defines an incapacitated person is the same as Sec. 75-1-201 (18) of the Utah Probate Code.

The constitutionality of both statutes was attacked In Re Boyer 636 P.2d 1085. Omitting citations, the Utah Court stated:

> Section 75-5-304 authorizes appointment of a guardian by the court and provides in part:
>
> > The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person . . . . . Alternatively, the court may dismiss the proceeding or enter any other appropriate order.
>
> Appellant contends that because a determination of incapacity may result in a deprivation of such fundamental rights as the right of privacy, the right to travel, and the right to make various personal decisions, the statutory provisions must meet due process requirements and contain well-defined standards. The argument is that the term 'responsible decisions concerning his person,'' as used in 75-1-201(18), is unconstitutionally vague and overbroad and that, because of the potential infringement of individual liberties, the statutory scheme is deficient in not incorporating the principle of the 'least restrictive alternative.' Finally, appellant argues that due process is violated because a finding of incomptency may be based on a preponderance of the evidence rather than clear and convincing proof. * * *

[3,4] Of course, 'the Constitution does not require impossible standards'; all that is required is that the language convey 'sufficiently definite' standards. United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-42, 91 L.Ed. 1877 (1947). Although vagueness is particularly repugnant if the statute could be construed to permit illegal interference with individual liberties, facial imprecision in statutory terms is not necessarily a reason to hold a statute unconstitutional, Roth v. United States 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed2d 1498 (1957). It is the duty of this Court to construe a statute to avoid constitutional infirmities whenever possible.

The term 'responsible decisions' is reasonably susceptible of a construction giving effect to the statute's basic purpose without improperly impinging on an individual's liberties of self-determination, right of privacy, right to travel, or right to make one's own educational and medical decisions. The basic State interest is in preventing an incapacitated person from causing harm to himself. The state has no interest in restricting harmless, unorthodox conduct; indeed, it must be remembered that much human progress has resulted from individuals who marched to their own tune and strayed outside usual customs and conventions. The benign purposes of the statute can be effectively accomplished without improperly trenching on those liberties by defining 'responsible decisions' in terms of speific, objective standards for determining the ability of one to care for oneself.

[5] We hold that under S 75-1-201(18) a determination that an adult cannot make 'responsible decisions concerning his person' and is therefore incompetent, may be made only if the putative ward's decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur. * * *

In addition to the issue of the constitutionality of the standard for determining incompetency, the appellant argues that the statutory provision specifying the powers of the guardian is unconstitutionally overbroad because the full scope of powers which may be, and in this case were, conferred on a guardian are not necessary in specific cases. In this case the least restrictive alternative, is closely allied with the more general overbreadth issue, and therefore, we address both together. Appellant specifically contends that the State must adopt the alternative least restrictive of the alleged incompetent's liberty and that the Utah procedure sweeps too broadly in permitting a guardian to be invested with wide-ranging powers over the personal decision of one who has not need of complete supervision, although there may be a need for assistance in handling specific aspects of his or her personal affairs.

[6] A legitimate state purpose cannot be accomplished by means that broadly 'stifle fundamental personal liberties when the end can be more narrowly achieved.' * * *

The means adopted must be narrowly tailored to achieve the basic statutory purpose.

The least restrictive alternative standard has been applied in involuntary commitment proceedings. In Welsch v. Likins, 373 F.Supp. 487, 502 (D.Minn.1974), the Court required state officials to make good faith attempts to place [involuntarily committed] persons in settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties'. * * *

[7,8] Although the restrictions on, and deprivation of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial. Accordingly, a court in appointing a guardian must consider the interest of the ward in retaining as broad a power of self-determination as is

> consistent with the reason for appointing a guardian of the person.
>
> The nature and extent of the powers to be conferred on a guardian is for the court to decide. Section 75-5-312(1) provides: 'A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting unemancipated minor child . . . except as modified by order of the court. . . .' Although the powers conferred upon a guardian may be very broad, the court is authorized to tailor the powers of a guardian to the specific needs of the ward. In appointing a guardian, the court should state with particularity the powers granted, unless the full scope of the statutory authorization is warranted. The process should be individualized and based upon careful consideration of the particular need for supervision. Cf. In re Roe, — Mass. — 421 N.E.2d 40 (1981).
>
> To enable the court to fashion an appropriate remedy, the parties should submit evidence' . . . showing the proposed ward's inability to think or act for himself as to matters concerning his personal health, safety, and general welfare. . .' Fazio v. Fazio, 375 Mass. 394, 403 378 N.E.2d 951 (1978). Based on this evidence, findings of fact should be made to support the powers conferred on the guardian, and those powers should be as clearly defined as the circumstances permit. So construed, the *guardianship statute is not unconstitutionally overbroad.* (Emphasis supplied)

Boyer was reversed not because of constitutionality, but because of the standard of evidence.

Applying the reasoning of the Utah court to the Nebraska statute as originally passed, the Nebraska statutes are constitutional as fulfilling the requirements of the "least restrictive alternative".

Factually, original section 30-2628 in Nebraska (same as Sec. 75-5-312 in Utah), has since been amended to require the guardian to report the condition of his ward at least every two years, and the court can, after notice and hearing, direct that additional rights be returned to the ward or assigned to the guardian. This provision coupled with those of Sec. 30-2620 R.S. Supp. 1982 (Sec. 6 to L. B. 428), clearly set forth the policy of the legislature that the court shall follow the principle of the "least restrictive alternative". It should be noted that the Utah code contained no language similar to subsections (1) through (9) of Sec. 30-2620 R. S. Supp. 1982 (Sec. 6 of L. B. 428).

It is argued the standards of "necessary or desirable" and "sufficient understanding to make or communicate responsible decisions concerning her own person" violate the due process because they are void for vagueness.

The same argument was made in *Boyer,* and the Utah Court dismissed the argument with the observation that the constitution does not require an impossible standard, and all that is required is that the language convey sufficiently definite standards, and facial imprecision in statutory terms is not necessarily a reason to hold a statute unconstitutional.

It is argued that L. B. 428 makes an unconstitutional presumption that an elderly person like Mrs. Sim is incompetent just because proceedings for guardianship or conservatorship are brought against her. The court has been unable to find any such presumption in the statutory language, and no language which can be construed as creating a presumption has been identified by the trustee.

It is argued that due process is violated because Mrs. Sim was not informed of her constitutional right to refuse to incriminate herself, and was forced to testify against herself. This is neither a criminal proceeding nor a commitment proceeding, and the Miranda warnings are unnecessary. No authority appropriate to a proceeding of this nature is cited by the trustee.

Dr. Kenney's testimony is attacked because it violated the privilege of a confidential physician-patient communication.

The trustee cites Chacko v. State, a Texas involuntary commitment proceeding. Privileged communications are creatures of statutes and governed by the statutes. In a Texas commitment proceeding, there are only two methods a patient can waive the privilege. One was a written waiver which was not executed. The other was an oral waiver when the examination was made pursuant to a court order only if the patient was first informed, prior to the time the oral waiver was given, that the communication would not be privileged. The authorities in *Chacko* did not comply with the stattuory method of waiver and the doctor's testimony was properly excluded under the Texas law.

Estelle v. Smith, a United States Supreme Court decision, was a Texas death penalty criminal case. The testimony of the examining psychiatrist was admitted at the trial and the defendant was sentenced to death. No Miranda rights were given to the defendant at the time of the medical examination.

The Supreme Court ruled the testimony of the psychiatrist was barred because of Fifth Amendment violations, not the violation of a physician-patient relationship. *Estelle* is not any authority in this proceeding.

The physician—patient privilege is governed by Sec. 27-504. When Kent Neumeister objected to Dr. Kenney's testimony on the basis it was in violation of the statute, the court inquired as to what particular portions of the statute were the basis of the objection. The response was simply "the statute".

It should be first noted the communication was not confidential in that it was intended to be disclosed to the court and third persons. If I recall the testimony correctly, Dr. Kenney advised Mrs. Sim that he was appointed by the court to examine her, and the results of it would not be confidential because a report was going to the court. This was a court ordered examination on the issues of her incapacity and her ability to effectively manage her property and the communications thereof are not privileged with respect to the purpose for which the examination was ordered unless the court ordered otherwise (which it did not). There is no privilege relevant to the issue of her mental condition in this proceeding in which Mrs. Sim relies upon her mental condition as an element of her defense.

There is no statutory privilege as to the testimony of Dr. Kenney. Section 27-504 (1) (c), (4) (b), and (4) (c).

It is urged in the Otoe County District Court brief, at page 28, that recent cases involving mental disability statutes require the standards and procedures to incorporate the least restrictive alternative. Cases cited are O'Connor v. Donaldson, Colyar v. Third Judicial District, Suzuki v. Quisenberry, Lynch v. Baxley, and Lessard v. Schmidt.

The statement is correct and the cases cited all involved involuntary commitments and detention. They are hardly model precedents in this guardianship case. The issue as to least restrictive alternative is decided by *Boyer* and the amendments of L. B. 428.

Estate of Early is cited as apparent authority for the proposition that a conservator should not be appointed in this case. *Early* was a California proceeding under section 5000 et seq. of West's Annotated California Welfare and Institutions code. A conservator under that code can be a conservator not only of the estate as provided in Nebraska, but also of the person of one "gravely disabled", and the code is known as the "Lanterman-Petris-Short Act". The announced legislative intent of the act is to "end the inappropriate, indefinite and involuntary commitment of mentally disordered persons" (Sec. 5001) and "It is the policy of this state as declared and established in this act and in the Lanterman Mental Retardation Act of 1969, that mentally and physically persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability". Sec. 5115.

The underlying issue in *Estelle* was the evidence a jury might consider "in determining whether a person is 'gravely disabled' and, therefore subject to a conservatorship proceeding and involuntary confinement under the Lanterman-Petris-Short Act". Such was the statement of the California Court in the opening paragraph of its opinion in 673 P. 2d 209.

Early may be of some value here in the guardianship phase of this proceeding, but not in the conservatorship portion. It should not be necessary to repeat that Sims is not a commitment proceeding.

The court finds the presumption of constitutionality of the statutes has not been overcome and that all objections based on unconstitutionality should be overruled.

The court finds, by clear and convincing evidence, that Maude C. Sim is impaired by reason of senile dementia to the extent she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person with regard to selecting her place of abode; arranging for her medical care; protecting her personal effects, and giving necessary consents, approvals or releases.

The court further finds, by clear and convincing evidence, that Maude C. Sim cannot effectively manage or apply her estate to necessary ends because she lacks the ability to do so by reason of senile dementia; she has property which will be wasted or dissipated unless proper management is provided, and a conservator should be appointed.

The court finds the appointment of a guardian of Maude C. Sim is necessary or desirable as a means of providing continuing care and supervision of her person.

The court finds that Alan M. Wood is a suitable person and should be appointed guardian and conservator, without bond, of Maude C. Sim.

The court finds that, until further order of the court, the authority of the guardian should be limited to: monitoring her condition at the Milder Manor in Lincoln; reporting to the court on same every three months after letters are issued; setting aside any restrictions on rights of visitation with her, and to waive on her behalf any statutory or other privileges as to confidential communications.

Until further order of the court, the court finds the authority of the conservator should be limited to: obtaining a copy of the power of attorney and trust agreement; procure an accounting, pursuant to Chapter 30, Article 28 of the statutes, of all assets Harvey A. Neumeister claims to hold as trustee for Maude C. Sim and of all receipts and expenditures as trustee.

The court finds that, on the evidence before the court, it is unnecessary to grant adidtional powers to the guardian and conservator because there is no evidence of such necessity at this time.

IT IS SO ORDERED.

Dated this 6th day of July, 1984.

/s/ Robert C. McGowan
Judge

(SEAL)

Richard H. Hoch
Wililam L. Walker
Harvey A. Neumeister
Kent J. Neumeister
Alan M. Wood
Paul Douglas

(Filed July 9, 1984)

APPENDIX D

OFFICE OF CLERK OF THE SUPREME COURT
LINCOLN, NE 68509 6-17-87

IN CASE OF IN RE GUARDIANSHIP OF SIM,

NO. 85-422

THE FOLLOWING ORDERS HAVE BEEN MADE:

Motion of appellant for rehearing overruled.

Motion of appellant to stay mandate overruled.

RESPECTFULLY,
CLERK OF
THE SUPREME COURT

APPENDIX E

In the Supreme Court of the
State of Nebraska

IN RE GUARDIANSHIP)
AND CONSERVATORSHIP)
OF MAUDE CLEVENGER SIM.)
MAUDE CLEVENGER SIM,)
Appellant,) No. 85-422
v.)
EDITH R. WRIGHT AND)
OPAL C. COMISKEY,)
Appellees.)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Maude Clevenger Sim, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska, overruling the appellant's motion for rehearing, entered in this action on June 17, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ J. Patrick Green
2500 California Street
Omaha, Nebraska 68178
(402) 280-2872
A Member of the Bar
of the Supreme Court
of the United States

/s/ Harvey A. Neumeister
1201 Second Corso
Nebraska City, Nebraska 68410
(402) 873-5611

/s/ Kent J. Neumeister
1201 Second Corso
Nebraska City, Nebraska 68410
(402) 873-5611
Counsel for Appellant

CERTIFICATE OF SERVICE

I, J. Patrick Green, a member of the Bar of this Court, hereby certify that on this 22 day of June 1987, three copies of the Notice of Appeal to the Supreme Court of the United States in the above-entitled case, were mailed first class postage prepaid, to (1) Richard H. Hoch, Esq., Hoch & Steinheider, Three Professional Plaza, Tenth Street and First Avenue, Nebraska City, Nebraska 68410, counsel for the appellees, (2) Alan M.Wood, Attorney at Law, 562 Fifth Street, Syracuse, Nebraska 68446, and (3) Ms. Ruth Anne Evans, Assistant Attorney General, Department of Justice for the State of Nebraska, State Capitol Building, Lincoln, Nebraska 68509. I further certify that all parties required to be served have been served.

/s/ J. Patrick Green
Counsel for Appellant
2500 California Street
Omaha, Nebraska 68178
(402) 280-2872

(Received June 22, 1987)

APPENDIX F

REVISED STATUTES OF NEBRASKA (Reissue 1985)

Chapter 30. Decedents' Estates.

Article 26. Protection of Persons Under Disability and Their Property.

Part 3. Guardians of Incapacitated Persons.

* * *

30-2619. *Procedure for court appointment of a guardian of an allegedly incapacitated person.* (a) The allegedly incapacitated person or any person interested in his or her welfare may petition for a finding of incapacity and appointment of a guardian. The petition shall be verified and shall contain allegations with regard to any of the areas as provided under section 30-2619.01 in which the petitioner claims that the allegedly incapacitated person lacks sufficient understanding to make or communicate responsible decisions concerning his or her own person.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his or her own choice or has indicated a desire for an attorney of his or her own choice, it may appoint an attorney to represent him or her in the proceeding, who shall have the powers and duties of a guardian ad litem.

(c) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit his or her report in writing to the court and may be interviewed by a visitor, if so appointed pursuant to sections 30-2619.01 and 30-2624, sent by the court.

(d) The person alleged to be incapacitated is entitled to be present at the hearing in person, and is entitled to see and hear all evidence bearing upon his or her condition. He or she is entitled to be present by counsel, to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor appointed by the court pursuant to sections 30-2619.01 and 30-2624. The issue may be determined at a closed hearing only if the person alleged to be incapacitated or his or her counsel so requests.

30-2619.01. *Visitor appointment; conduct evaluation; duties.* Following the filing of a petition, the court may appoint a visitor and direct such visitor to conduct an evaluation of the allegations of incapacity as provided under this section. To conduct the evaluation of the allegations of incapacity, the visitor shall interview the allegedly incapacitated person, the person seeking appointment as guardian, the agencies providing services to the allegedly incapacitated person, and other persons and agencies that may provide relevant information. The visitor shall also visit the present place of abode of the person alleged to be incapacitated and, if any change of residence is anticipated, the place it is proposed that he or she will be detained or reside if the requested appointment is made, and submit his or her report in writing to the court.

As part of the evaluation of allegations of incapacity, a visitor, if appointed, shall obtain evidence relating to the allegedly incapacitated person's ability to make, communicate, or carry out responsible decisions concerning his or her person with regard to:

(1) Selecting his or her place of abode within or without this state;

(2) Arranging for his or her medical care;

(3) Protecting his or her personal effects;

(4) Giving necessary consents, approvals, or releases;

(5) Arranging for training, education, or other habilitating services appropriate to him or her;

(6) Applying for private or governmental benefits to which he or she may be entitled;

(7) Instituting proceedings to compel any person liable for the support of the proposed ward to support him or her if no conservator has been appointed for the proposed ward;

(8) Entering into contractual agreements if no conservator has been appointed for the proposed ward;

(9) Receiving money and tangible property deliverable to him or her and applying such money and property to his or her expenses for room and board, medical care, personal effects, training, education, and habilitative services; and

(10) Any other area of inquiry which the court may direct.

30-2619.02. *Visitor's guardianship evaluation; how conducted.* The guardianship evaluation by the visitor shall be conducted with minimum interference with the allegedly incapacitated person's activities. Any interviews and examinations shall take place in the usual residence unless the visitor deems it necessary to conduct the interview or examination elsewhere. In cases of such necessity, the interview or examination shall take place during normal business hours.

30-2619.03. *Visitor; evaluation report; contents.* The visitor shall file an evaluation report based upon the evaluation of the allegations of incapacity with the court within sixty days of the filing of the guardianship petition. Copies of the evaluation report shall be made available to the guardian ad litem, the proposed ward, and the petitioner. The evaluation report shall contain:

(1) A record of the visitor's interviews;

(2) Evidence obtained in each of the categories listed in section 30-2619.01;

(3) Recommendations as to the need of the proposed ward for a guardian in each of the areas listed in section 30-2619.01;

(4) The visitor's opinion as to the appropriateness of the person seeking appointment as guardian;

(5) Recommendations as to other appropriate candidates; and

(6) The visitor's opinion as to the needed duration of the guardianship.

30-2619.04. *Visitor's evaluation report; responses.* The petitioner and the proposed ward shall have ten judicial days to file responses to the visitor's evaluation report.

30-2620. *Findings; appointment of guardian; authority and responsibility of guardian.* The court may appoint a guardian as requested if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care or supervision of the person of the incapacitated person. The court may, at the time of appointment or later, specify the authorities and responsibilities which the guardian and ward, acting together or singly, shall have with regard to:

(1) Selecting the ward's place of abode within or without this state;

(2) Arranging for medical care for the ward;

(3) Protecting the personal effects of the ward;

(4) Giving necessary consent, approval, or releases on behalf of the ward;

(5) Arranging for training, education, or other habilitating services appropriate for the ward;

(6) Applying for private or governmental benefits to which the ward may be entitled;

(7) Instituting proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform such duty, if no conservator has been appointed;

(8) Entering into contractual arrangements on behalf of the ward, if no conservator has been appointed; and

(9) Receiving money and tangible property deliverable to the ward and applying such money and property to the ward's expenses for room and board, medical care, personal effects, training, education, and habilitating services, if no conservator has been appointed, or requesting the conservator to expend the ward's estate by payment to third persons to meet such expenses.

If the court does specify such authorities and responsibilities, the specifications shall be endorsed upon the letters of appointment of the guardian, and shall be treated as specific limitations upon the general powers, rights, and duties accorded by law to the guardian. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

30-2620.01. *Guardian ad litem, physician, visitor; fees and costs; how paid.* The reasonable fees and costs of a guardian ad litem, physician, and visitor appointed by the court shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the ward if the ward possesses an estate, or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

* * *

30-2624. *Visitor; qualifications.* A visitor shall be trained in law, nursing, social work, mental health, mental retardation, gerontology, or developmental disabilities and shall be an officer, employee, or special appointee of the court with no personal interest in the proceedings.

Any qualified person may be appointed visitor of a proposed ward, except that it shall be unlawful for any owner, part owner, manager, administrator, or employee, or any spouse of an owner, part owner, manager, administrator, or employee of a nursing home, room and board home, convalescent home, group care home, or institution providing residential care to any person physically or mentally handicapped, infirm, or aged to be appointed visitor of any such person residing, being under care, receiving treatment, or being housed in any such home or institution within the State of Nebraska.

The court shall select the visitor who has the expertise to most appropriately evaluate the needs of the person who is allegedly incapacitated.

The court shall maintain a current list of persons trained in or having demonstrated expertise in the areas of mental health, mental retardation, drug abuse, alcoholism, gerontology, nursing, and social work, for the purpose of appointing a suitable visitor.

30-2625. *Notices in guardianship proceedings.* (a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his or her spouse, parents, and adult children;

(2) any person who is serving as his or her guardian or conservator or who has his or her care and custody; and

(3) in case no other person is notified under (1), at least one of his or her closest adult relatives, if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, and his or her spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in section 30-2220. Waiver of notice by the person alleged to be incapacitated is not effective unless he or she attends the hearing or his or her waiver of notice is confirmed in an interview with the visitor or such notice is waived by a guardian ad litem. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

(c) In addition to notifying him or her of the filing of the petition and the time and place of the hearing on the petition, the notice required to be served upon the allegedly incapacitated person shall list the following rights of the person:

(1) The right to have an attorney appointed;

(2) The right to present evidence in his or her own behalf; and

(3) The right to request that the power of the guardian, if appointed, be limited by the court.

The court may require that the notice contain such other matters as the court may deem appropriate.

30-2626. *Temporary guardians.* If an incapacitated person has no guardian and an emergency exists, the court may, pending notice and hearing, exercise the power of a guardian or appoint a temporary guardian. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six months. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this code concerning guardians apply to temporary guardians.

30-2627. *Who may be guardian; priorities; bond.* (a) Any competent person or a suitable institution may be appointed guardian of an incapacitated person, except that it shall be unlawful for any agency providing residential care in an institution or community-based program, or any owner, part owner, manager, administrator, or employee, or any spouse of an owner, part owner, manager, administrator, or empolyee of any nursing home, room and board home, convalescent home, or institution engaged in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged to be appointed guardian or conservator of any such person residing, being under care, receiving treatment, or being housed in any such home or institution within the State of Nebraska. Nothing in this subsection shall prevent the allegedly incapacitated person's spouse, adult child, parent, or relative from being appointed guardian.

(b) Persons who are not disqualified and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:

(1) a person nominated most recently by either of the following methods:

(i) a person nominated by the incapacitated person in a power of attorney or a durable power of attorney; or

(ii) a person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;

(2) the spouse of the incapacitated person;

(3) an adult child of the incapacitated person;

(4) a parent of the incapacitated person, including a person nominated by will or other writing signed by deceased parent;

(5) any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;

(6) a person nominated by the person who is caring for him or her or paying benefits to him or her.

(c) The court may require a guardian to furnish a bond in an amount and conditioned in accordance with the provisions of section 30-2640.

30-2628. *General powers and duties of guardian.* (a) A guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a parent has respecting his or her unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he or she is en-

titled to custody of the person of his or her ward any may establish the ward's place of abode within or without this state.

(2) If entitled to custody of his or her ward he or she shall make provision for the care, comfort, and maintenance of his or her ward and, whenever appropriate, arrange for his or her training and education. Without regard to custodial rights of the ward's person, he or she shall take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(4) If no conservator for the estate of the ward has been appointed, he or she may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his or her duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but he or she may not use funds from his or her ward's estate for room and board which he or she, his or her spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible.

He or she must exercise care to conserve any excess for the ward's needs.

(5) A guardian is required to report the condition of his or her ward and of the estate which has been subject to his or her possession or control, at least every two years and as required by the court or court rule. The court shall receive from any interested person, for a period of thirty days after the filing of the guardian's report, any comments with regard to the need for continued guardianship or amendment of the guardianship order. If the court has reason to believe that additional rights should be returned to the ward or assigned to the guardian, the court shall set a date for a hearing and may provide all protections as set forth for the original finding of incapacity and appointment of a guardian.

(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his or her services and for room and board furnished to the ward as agreed upon between him or her and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

* * *

Part 4. Protection of Property of Persons Under Disability and Minors.

30-2630. *Protective proceedings.* Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

(1) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his or her minority, or that funds are needed for his or her support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person if the court determines that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, or lack of discretion in managing benefits received from public funds, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported

by him or her and that protection is necessary or desirable to obtain or provide funds.

30-2631. *Protective proceedings; jurisdiction of affairs of protected persons.* After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

* * *

30-2633. *Original petition for appointment or protective order.* (a) The person to be protected, any person who is interested in his or her estate, property affairs, or welfare including his or her parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his or her property and property affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set forth, to the extent known, the interest of the petitioner; the name, age, residence, and address of the person to be protected; the name and address of his or her guardian, if any; the name and address of his or her nearest relative known to the petitioner; a general statement of his or her property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which he or she is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his or her priority for appointment.

30-2634. *Notice; waiver.* (a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least fourteen days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with section 30-2220.

(b) If petitioners are the natural parents, or if petitioner is a surviving natural parent, or a parent who has been given sole and exclusive custody of the minor in a legal proceeding, petitioners or petitioner may waive notice to parents, and may also waive notice to the minor, if the minor be under the age of fourteen years. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor or such notice is waived by a guardian ad litem. The court may, in its discretion, direct that notice be given as provided in section 30-2220 or in any other manner and to any other persons as the court may determine.

(c) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under section 30-2635 and to interested persons and other persons as the court may direct. Except as otherwise provided in (a) and (b), notice shall be given in accordance with section 30-2220.

* * *

30-2636. *Procedure concerning hearing and order on original petition.* (a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if fourteen years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

30-2637. *Permissible court orders.* The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The court may exercise or direct the exercise of its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding twenty per cent of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either

is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person to make a will or for any other purpose.

30-2638. *Protective arrangements and single transactions authorized.* (a) If it is established in a proper proceeding that a basis exists as described in section 30-2630 for affecting the property and affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in section 30-2630 for affecting the property and affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

30-2639. *Who may be appointed conservator; priorities.* (a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a person nominated most recently by either of the following methods:

(i) a person nominated by the protected person in a power of attorney or durable power of attorney; or

(ii) a person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the protected person;

(2) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(3) an individual or corporation nominated by the protected person if he or she is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(4) the spouse of the protected person;

(5) an adult child of the protected person;

(6) a parent of the protected person, or a person nominated by the will of a deceased parent;

(7) any relative of the protected person with whom he or she has resided for more than six months prior to the filing of the petition;

(8) a person nominated by the person who is caring for him or her or paying benefits to him or her.

(b) A person in priority (2), (4), (5), (6), or (7) may nominate in writing a person to serve in his or her stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

* * *

30-2643. *Compensation and expenses.* If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

30-2644. *Death, resignation, or removal of conservator.* The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the court may appoint another conservator on such notice as the court may direct. A conservator so appointed succeeds to the title and powers of his predecessor.

* * *

30-2646. *General duty of conservator.* In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by section 30-2813.

30-2647. *Inventory and records.* Within ninety days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

30-2648. *Accounts.* Every conservator must account to the court for his administration of the trust upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

30-2649. *Conservators; title by appointment.* The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provisions by contract or dispositive instrument relating to a conservator.

30-2650. *Recording of conservator's letters.* Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person.

* * *

30-2653. *Powers of conservator in administration.* (a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of a minor, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in section 30-2613 until the minor attains his majority, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by part 2.

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation to

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with subsection (b);

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or pri-

vate sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets, and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person, except a wrongful death, tort, or similar claim, by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or his dependent without liability to the conservator, by

paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or, if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator, to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

(d) A conservator with court approval may settle a wrongful death, tort, or similar claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible.

30-2654. *Distributive duties and powers of conservator.* (a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person, except as provided in section 30-2613 if the protected person be a minor, and his dependents in accordance with the following principles:

(1) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures which the conservator might have made, or in advance for services to be

rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year twenty per cent of the income from the estate upon court approval.

(c) When a minor who has not been adjudged disabled under section 30-2630(2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribuate all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after forty days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under section 30-2413 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in section 30-2421 and parts 6 to 10 of Article 24 except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

30-2655. *Limitation of powers of conservator.* The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by sections 30-2653 and 30-2654, or previously conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by section 30-2653 or 30-2654, the limitation shall be endorsed upon his letters of appointment.

30-2656. *Preservation of estate plan.* In investing the estate, and in selecting assests of the estate for distribution under subsections (a) and (b) of section 30-2654, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

* * *

APPENDIX G

REVISED STATUTES OF NEBRASKA (Reissue 1979).

Chapter 30. Decedents' Estates.

Article 26. Protection of Persons Under Disability and their Property.

General Comment.

GENERAL COMMENT

Article 26, entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the Article offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former.

* * *

APPENDIX H

REVISED STATUTES OF NEBRASKA (Reissue 1979)

Chapter 30. Decedents' Estates.

Article 26. Protection of Persons Under Disability and Their Property.

Part 5. Powers of Attorney.

(The statute which was in effect when Mrs. Sim executed her durable power of attorney on October 7, 1982.)

PART 5

POWERS OF ATTORNEY

30-2662. *When powers of attorney not affected by disability.* Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words This power of attorney shall not be affected by disability of the principal, or This power of attorney shall become effective upon the disability of the principal, or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not diasbled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

APPENDIX I

REVISED STATUTES OF NEBRASKA (Reissue 1985)

Chapter 27. Courts; Rules of Evidence.

Article 5. Privileges.

27-504. *Rule 504. Physician-patient privilege; definitions general rule of privilege; who may claim privilege; exceptions to the privilege.* (1) As used in this rule:

(a) A patient is a person who consults or is examined or interviewed by a physician for purposes of diagnosis or treatment of his physical, mental or emotional condition;

(b) A physician is (i) a person authorized to practice medicine in any state or nation, or is reasonably believed by the patient so to be, or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, who devotes all or a part of his time to the practice of clinical psychology; and

(c) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his physical, mental or emotional condition, among himself, his physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(4)(a) There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(b) If the judge orders an examination of the physical, mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

* * *

APPENDIX J

REVISED RULES OF THE SUPREME COURT OF THE STATE OF NEBRASKA

Nebraska Discovery Rules for all Civil Cases Promulgated by the Nebraska Supreme Court.

Effective January 1, 1983.

Rule 35. *Physical and Mental Examination of Persons.*

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

* * *

APPENDIX K

REVISED STATUTES OF NEBRASKA (Reissue 1985).

Chapter 25. Courts, District; Civil Procedure.

Article 21. Actions and Proceedings in Particular Cases.

(j) Declaratory Judgments.

25-21,149. *Declaratory judgments; courts of record; jurisdiction.* Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

APPENDIX L

REVISED STATUTES OF NEBRASKA (Reissue 1985)

Chapter 24. Courts.

Article 5. County Court.

24-541.03. *Appeal; operate as supersedeas; when; bond.*

* * *

(2) In appeals in matters arising under the Nebraska Probate Code the appeal shall be a supersedeas for the matter from which the appeal is specifically taken, but not for any other matter.

APPENDIX M

IN THE COUNTY COURT OF OTOE COUNTY, NEBRASKA

IN THE MATTER OF THE	)	No. T-526
GUARDIANSHIP AND	)	PETITION FOR
CONSERVATORSHIP	)	APPOINTMENT OF
	)	GUARDIAN AND
OF	)	CONSERVATOR
	)	
MAUDE CLEVENGER,	)	(FILED SEP 3 1982
A Protected Person	)	Otoe County Court)
	)	

COMES NOW, Opal C. Comiskey and Edith R. Wright, and allege as follows:

1. That they are the natural sisters of Maude Clevenger Sim, a protected person who is 82 years of age and resides at 706 First Avenue, Nebraska City, Nebraska, 68410, and that they are interested in the welfare of the said Maude Clevenger Sim.

2. That Maude Clevenger Sim is impaired by reason of physical disability and advanced age; that she lacks

sufficient understanding or capacity to make or communicate responsible decisions concerning her person and that the appointment of a guardian is necessary or desirable as a means of providing continuing care and supervision of the person of the above-captioned person.

3. That by reason of her impairments as set forth in paragraph 2 above, Maude Clevenger Sim lacks sufficient understanding or capacity to care for her assets, to do her own banking, supervise the payment of her obligations, competently care for her estate and that there is substantial risk that her property will be wasted or dissipated unless proper management is provided and that by reason thereof, the appointment of a conservator is necessary.

4. Venue for this proceeding is proper in this county because said person presently resides herein.

5. No guardian or conservator has been appointed for Maude Clevenger Sim.

6. The names and addresses of the nearest relatives of the person sought to be protected are as follows:

Opal C. Comiskey
Riverview Terrace, Apt. #304
Nebraska City, Nebraska 68410

Edith R. Wright
1607 Harding Road
Des Moines, Iowa 50314

Ada H. Sieberling
1328 Second Avenue
Des Moines, Iowa 50314

7. That petitioners and other heir as shown above, have equal priority for appointment as guardian and con-

servator, and, Opal C. Comiskey and Edith R. Wright are suitable and proper persons to act as guardian of the person and conservator of the estate and affairs of the person of Maude Clevenger Sim, and are entitled to consideration for appointment pursuant to the Nebraska Probate Code.

8. The persons named above are required by law to be given notice of the time and place of hearing on this petition.

WHEREFORE, petitioners request that this Court pick a time and place for hearing on this petition; that notice be given to all persons entitled thereto as provided by law; and upon hearing, find that Maude Clevenger Sim is incapacitated and that the appointment of a guardian and conservator is necessary or desirable as a means of providing continuing care and supervision of the person and the estate of Maude Clevenger Sim, and appoint Opal C. Comiskey and Edith R. Wright as guardian and conservator and that letters of appointment be issued to the guardian and conservator.

DATED: August 25, 1982.

/s/ Opal C. Comiskey
/s/ Edith R. Wright

* * *

APPENDIX N

IN THE COUNTY COURT OF OTOE COUNTY, NEBRASKA

No. T-526

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE CLEVENGER SIM, A Protected Person.	)	ORDER FOR HEARING AND APPOINTMENT OF GUARDIAN AD LITEM AND PHYSICIAN

(FILED SEP 3 1982
Otoe County Court)

Upon the filing of the Petition of Opal C. Comiskey and Edith R. Wright, seeking appointment of a guardian and conservator for Maude Clevenger Sim, an alleged incapacitated person;

IT IS ORDERED:

1. That the Petition of Opal C. Comiskey and Edith R. Wright for the appointment of a guardian and conservator of Maude Clevenger Sim, will be heard before this Court on September 24, 1982, at 1:30 o'clock p.m., in the County Court of Otoe County, Nebraska and notice shall be given to those entitled to notice in the manner provided by law.

2. That Randall Rehmeier, attorney at law, is hereby appointed guardian ad litem for Maude Clevenger Sim, an alleged incapacitated person, and the guardian ad litem shall represent Maude Clevenger Sim in these proceedings.

3. That Gary L. Rademacher, M.D., a physician licensed to practice medicine in the State of Nebraska is appointed to examine the alleged incapacitated person and he shall submit his report in writing to the Court.

SIGNED: September 3d, 1982.

BY THE COURT:

/s/ Albert C. Walsh
County Judge

(SEAL)

APPENDIX O

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE C. SIM

NOTICE

TO: RANDALL L. REHMEIER, Guardian ad litem or any other person appointed by the Court to so act:

Maude C. Sim does not recognize the authority of a Guardian ad litem appointed by the Court. She considers this action contrary to her rights and against her consent. She refuses to cooperate with any and all requests made upon her. She instructs her attorney or attorneys to continue to handle her affairs as has always been done.

No action or information or interviews can be taken with regard to her without being cleared in advance only by and upon proper advance Notice to her and her attorneys, by and in the presence of approval her attorney or attorneys.

This entire action is contrary to her business interests, her privacy, her welfare, her reputation, and her excellent standing and bearing in the community.

Dated September 8, 1982.

MAUDE C. SIM
By: Harvey A. Neumeister
Her Attorney Harvey A. Neumeister

(FILED SEP 8 1982 Otoe County Court)

APPENDIX P

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE C. SIM

NOTICE

TO: DR. GARY L. RADEMACHER OR AND INCLUDING ANY MEMBER OF THE FIRM CALLED FAMILY PHYSICIANS OF NEBRASKA CITY, NEBRASKA, AND DOCTORS UNDER THEIR DIRECTION OR ORDERS WHO EXAMINED OR ATTENDED MAUDE C. SIM OF NEBRASKA CITY, NEBRASKA:

That Maude C. Sim instructs you or any of you as her doctor or doctors to refuse to cooperate with the guardianship proceeding presently instituted by Opal Comiskey, et al. against her in the County Court of Otoe County, Nebraska.

This also applies to all other doctors or those working as examiners at the direction of said firm, either in Nebraska City or Omaha, or elsewhere who examined her as her doctors or examiners under doctors.

She considers all oral or any written conversation, records or notes or reports with you or any of you of her medical history or situation, including tests prepared on her, in any manner, as privileged communication which are confidential to her alone or her attorney or attorneys.

The rules of evidence bar the introduction of these matters from many legal proceedings moreover your cooperation in any manner with the petitioners or their attorney or the guardian ad litem appointed by the Court, constitutes an invasion of her privacy which is actionable at law.

Maude C. Sim went over in detail all this matter, spoke very clearly and in definite understanding with her attorney and these are her instructions to protect her personally, her business interests, her welfare and her privacy and reputation.

Dated September 8, 1982.

MAUDE C. SIM
By: /s/ Harvey A. Neumeister
Her Attorney, Harvey A. Neumeister

(FILED SEP 8 1982 Otoe County Court)

APPENDIX Q

IN THE COUNTY DISTRICT COURT OF
OTOE COUNTY, NEBRASKA

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP

OF

MAUDE CLEVENGER SIM,
A Protected Person

) No. T526
) Objections and Answers to Petition for Guardianship and Conservatorship over Maude Clevenger Sim, and Petition for Declaratory Judgment that L.B. 428 Is Unconstitutional
) (FILED SEP 17 1982 Otoe County Court)

Comes now objector and petitioner, Maude Clevenger Sim, and for her answer to the petition of petitioners and for her petition for declaratory judgment against the following named defendants alleges that L.B. 428, enacted by the Eighty Seventh Nebraska Legislature Second Session 1982, which amended Sections 30-2629, 30-2620, 30-2627, 30-2628, and 30-2530, R.R.S. 1943, is unconstitutional both on its face and as applied to her particular case. Objector further alleges that the guardianship and conservatorship proceedings against her should be stayed until the District Court of Otoe County, Nebraska has held a hearing on her petition for a temporary injunction to enjoin the defendants from further prosecution of the proceedings.

* * *

3. Objector admits she is a resident of Nebraska City, Otoe County, Nebraska, and has been for many years.

4. Objector specifically denies all other allegations in the petition filed against her unless they are hereinafter specifically admitted.

* * *

MAUDE CLEVENGER SIM
Objector and Petitioner

By /s/ William L. Walker
For Walker & Ludlam
William L. Walker
Attorney at Law
636 Stuart Building
Lincoln, Nebraska 68508
(408) 476-8573

/s/ Harvey A. Neumeister
Harvey A. Neumeister
Attorney at Law
1201 Second Corso
Nebraska City, Nebraska 68410

/s/ Kent J. Neumeister
Kent J. Neumeister
Attorney at Law
1201 Second Corso
Nebraska City, Nebraska 68410
Her Attorneys

State of Nebraska)
) SS.
Otoe County)

Maude Clevenger Sim, being duly sworn on oath, deposes and says that she has read all the allegations in her

Objections and Answers and Petition for Declaratory Judgment that L.B. 428, enacted by the Eighty Seventh Nebraska Legislature Second Session 1982, which amended Sections 30-2629, 30-2620, 30-2624, 30-2627, 30-2628, and 30-2630, R.R.S. 1943, is unconstitutional, and that all the allegations are true and correct.

Dated this 16 day of September, 1982.

/s/ Maude C. Sim
Maude Clevenger Sim
Objector and Petitioner

Subscribed and sworn to before me this 16 day of September, 1982.

/s/ Alta B. Neumeister
Notary Public
Commission expires April 9, 1985

APPENDIX R

Direct Examination and Cross Examination of Mrs. Alta B. Neumeister at the Trial on June 14, 1984.

* * *

Mr. Kent Neumeister: Direct Examination

(p. 80) Did you have any conversation with Mrs. Sim on October 6th, 1982?

Mrs. Alta B. Neumeister:

(p. 81) October 6th. On October 6th I have it that we visited with her and—

Q. Who was present at that conversation?

A. Pardon?

Q. Who was present at that conversation?

A. Mr. Walker, Mr. Neumeister, myself, and a notary. And we were present, all present in Mr. Walker's office.

Q. Was there any conversation that you had with Mrs. Sim the preceding day before the conversation you're referring to?

A. Yes.

Q. What was the nature of that conversation; who was present?

A. She was present, I was present, and Harvey was present.

Q. Where did this conversation take place?

A. Took place at the home. We went over the papers.

Q. What did you talk about?

A. We talked about the papers, talked about the two deeds—or the—yeah, the deed, the trust, conveying the car and conveying the beauty shop to Darlene.

Q. Did Mr. Neumeister talk to Mrs. Sim about the trust at that time?

A. He did.

Q. Did Mr. Neumeister read the trust to her?

(p. 82) A. He did.

Q. Did Mr. Neumeister also explain the trust to her?

A. He did.

Q. Did Mr. Neumeister ask Mrs. Sim if she understood what he was saying?

A. He did. And she says I do, and that's the way I want it.

Q. From your observation, what was Mrs. Sim's reaction to the trust?

A. Oh, she was happy that it was getting done.

JUDGE MCGOWAN: Was this after the petition had been filed for the appointment of guardian and conservator?

A. Yes.

JUDGE MCGOWAN: What was your answer?

A. Yes.

Q. Did Mr. Neumeister read to Mrs. Sim the deeds in which she gave away her home to Robert and Joan Comiskey?

A. He did.

Q. Did Mr. Neumeister explain to Mrs. Sim that she retain a life estate in that home?

A. She was very happy about that.

Q. What did Mr. Neumeister say about that life estate?

(p. 83) A. He said you can go home if you want to, if you want to rent it out to somebody else other than Joan and Bob, you may, and she says I don't want to do that, because, she says, it's in my will, I want to give it, and I want to give it—I might as well give it now.

Q. Would you please describe the events that happened on October 7, 1982. You previously talked about the event on October 6th, but now please describe the event on October 7, 1982.

A. We picked her up at the home, and we took her to Lincoln, and she wanted to go to Buffy's to eat before she went to Mr. Walker's office.

Q. What time did you pick her up that morning?

A. We picked her up about a quarter of ten.

Q. Did Mrs. Sim ask you to take her to Buffy's?

A. Definitely.

Q. Did she order her meal herself?

A. Yes. It's buffet style, she went around and picked out exactly what she wanted.

Q. Were certain legal documents executed that day by Mrs. Sim?

A. Right. In Mr. Walker's office.

Q. How long were you in Mr. Walker's office?

A. Let's say two hours, two hours and a half.

Q. Who was present at that time?

(p. 84) A. Mr. Walker, Mr. Neumeister, myself, Maude and the notary.

Q. How long were you in that office?

A. About two hours.

Q. Did Mrs. Sim sign various documents in Mr. Walker's office that day?

A. She did, but before she signed, he explained the paper to her, and he put the hand—his hand over where she was supposed to sign, and he said is that definitely what you want to do. And she said yes. When she came to Darlene's to give the beauty shop, she—

Q. Go ahead.

A. —she said I wonder if she'll want it.

Q. Did Mr. Neumeister ask Mrs. Sim whether she had read these documents?

A. He did.

Q. Did he ask Mrs. Sim whether she understood the documents?

A. He did.

Q. Did he ask her whether she read the documents as she signed each one?

A. Right.

Q. Did she—Did he ask whether she had signed—whether she had read them as she signed—whether she'd (p. 85) understood them as she signed each one?

A. Right.

Q. Did he ask whether she wanted the notary who was there to notarize the documents?

A. Right.

Q. What did you do after you left Mr. Walker's office?

A. May I make one statement?

Q. Sure.

A. When it was all over, she said oh, I'm glad that's done. That was her statement. Now, after that we went to shop a little bit. She wanted to buy some underclothes, and of course she's so thin, wouldn't fit.

Q. Where did you go to eat that evening?

A. We went to The Pantry. She liked to go to The Pantry, because she could get cake.

Q. Did she order her own meal?

A. Right.

Q. Did you then drive home to Nebraska City?

A. We did.

Q. What time did you arrive at Nebraska City?

A. About 9:30.

Q. Do you remember Mrs. Sim sleeping at any time during the day?

A. No. Very alert.

(80:24 to 85:25)

* * *

Mr. Richard H. Hoch: Cross Examination

(p. 111) Q. Do you know when the last time you know that she could read was? When was the last time you could (p. 112) remember that she could read and comprehend?

Mrs. Alta B. Neumeister:

A. She followed those documents that she signed, that trust agreement and those deeds that she signed—or one deed that she signed, and also the transfer of the car. She could read those. She had her mentality at that time.

* * *

APPENDIX S

AFFIDAVIT

I, Harvey A, Neumeister, Lawyer, of Nebraska City, Nebraska, being duly sworn on oath, states as follows:

That Maude Clevenger Sim of Nebraska City, Nebraska, has been a client of mine for over thirty years and that she has placed all her property in and executed an irrevocable Trust Agreement and Declaration whereby she has designated Harvey A. Neumeister as Trustee and Lawyer.

That the Trust Agreement includes the following statements:

> "I, Maude C. Sim, establish this trust so that some of my relatives or any one else do not trouble me. What funds and property I have come entirely from my husband's, Wilbur W. Sim, side of the family. I always keep my property in good order. However, I set up this irrevocable trust to make it absolutely unnecessary and impermissible for anyone including the State of Nebraska to put my person under guardianship or my property under conservatorship. My own protection of my own property under this trust defeats all attempts by some, including the State, to claim that my property is not being conserved for my benefit."
>
> "I definitely have a vested property right to keep my property private to me alone, and so I refuse to allow the contents of this trust, or the exact nature,

amount, or location of my property, to be disclosed in any judicial proceeding or otherwise. My trustee or attorneys by affidavit can only show there is executed a valid irrevocable trust and declaration and read this paragraph if necessary.''

''The trustee shall to the best of his or their ability pay in general all bills, insurance, repairs, taxes and all such to keep up my home and my medical bills, my life insurance in fact all proper accounts and bills, including as well any bills for a nursing home, and in such respect my trustee shall determine, he alone, his judgment to be final what is best for me at all times as to hospital, doctor, nursing homes and the like all for my welfare and benefit, and in fact in general all bills and all things for my benefit and welfare.''

''The trustee shall to the best of his or their ability take care in general of all property, all funds and investments, bank accounts, certificates, and so on, change, invest, reinvest, release, transfer, in fact anything, so all property, all funds, all investments are handled as he sees proper. I give him such unlimited full authority and power, and this also to completely handle the Sheldon land contract matter including settlement and release.''

''No person firm or corporation dealing with the trustee or trustees with reference to any property in this trust shall be required to ascertain the authority of the trustee to make any sale, transfer, mortgage, pledge, assignment or other transfer or disposal or transactions concerning the trust estate. Such persons, firms or corporations so dealing with the trustee or trustees shall be entitled to rely upon the transfer, delivery, assignment, or other instrument or act disposing of or pledging or mortgaging such property by the trustee as having been duly authorized in all particulars; and the receipt of the trustee for any payment made to them or for any assets added here-under shall be a complete discharge and acquittance to the extent specified in such receipt.''

''Also if I have not made it clear a simple statement where it may be required from my trustee is all that is necessary, to transfer, invest, collect, spend, settle, compromise, and so on, all that must be done for my benefit, and also my trustee has full power as to my own personal welfare, complete power and authority. I do not ever want or need a guardian or conservator by court action this trust agreement takes care of me personally and of my property.''

''Also if it is not clear by the broad general power and authority I have given, my trustee or trustees shall protect me personally and represent me, and hire legal help, and pay for it, as to any law suits or legal actions which concern me and my property, and even compromise in any of such, all as to his best and sole judgment.''

Dated this 3rd day of November, 1982.

/s/ Harvey A. Neumeister

Subscribed and sworn to me before this 3rd day of November, 1982.

/s/ Margie H. Gibbs
Notary Public

Commission expires June 3, 1986

APPENDIX T

AFFIDAVIT

I, Harvey A. Neumeister, Lawyer, of Nebraska City, Nebraska, being duly sworn on oath, states as follows:

That Maude Clevenger Sim of Nebraska City, Nebraska City, has been a client of mine for over thirty years, and that Mrs. Sim has made and delivered the following conveyances for her own welfare and benefit:

(1) A deed of her home and real estate at Seventh Street and First Avenue in Nebraska City to Robert and Joan Comiskey, with Mrs. Sim reserving a life estate in herself for her own benefit so that she can go home if and when she wants to.

(2) A bill of sale of the Maude C. Sim Hair Stylist Shop to Darlene Haschenburger, which is a transfer Mrs. Sim has planned on making for some time to Mrs. Haschenburger who has been an employee and colleague of Mrs. Sim for over twenty-seven years. Accordingly, Mrs. Sim is relieved of income tax obligations, accounting, labor reports, and social security payments. Mrs. Sim likewise has a place for permanents and weekly hairdos. Mrs. Sim also keeps her beauticians license renewed for work. Mrs. Sim is an outstanding lady of Nebraska City who insists that she keep this respect.

(3) A certificate of title of her older model Buick automobile to Robert and Joan Comiskey, another transfer Mrs. Sim has planned on making for some time. Accordingly, Mrs. Sim is relieved of insurance liability. Mrs. Sim also has her transportation provided for her when she needs to go to banks and building and loan associations to transact her business, to outside dinners and entertainment, to stores to buy dresses and sweaters, and to her weekly beauty appointments.

Mrs. Sim has executed these conveyances in the presence of an independent notary just the same as she signs her own deposit slips, interest checks, and annuity checks when she goes to the bank to do her own banking.

Dated this 20th day of November, 1982.

/s/Harvey A. Neumeister

Subscribed and sworn to before me this 20th day of November, 1982.

/s/ Andy Seybert
Notary Public

Commission expires Oct. 5, 1984

APPENDIX U

AFFIDAVIT

I, Harvey A. Neumeister, Lawyer, of Nebraska City, Nebraska, being duly sworn on oath, states as follows:

* * *

Mrs. Sim's trust is very complete. The trust takes care of all her property, provides for all her living and medical expenses, and takes care of all matters concerning her health and personal welfare. As her trustee and lawyer, I help Mrs. Sim decide what is best for her under all circumstances.

In her trust, Mrs. Sim especially delegated the duty to me to use my best judgment in securing the best doctors, hospitals, and nursing homes to give her the best health care available should any medical problems arise.

* * *

Mrs. Sim's trust was deliberately set up to accomplish certain purposes: First, it is absolutely unnecessary and thus impermissible as a matter of law to have any court interference in Mrs. Sim's life.

Second, her property is taken care of.

Third, her health and personal welfare are taken care of. In fact, any court appointment of a guardian when Mrs. Sim has already appointed a trustee to help take care of her welfare would put the guardian and the trustee into perpetual conflict as to how to handle any and all questions about her welfare.

Fourth, the nature, amount, and location of her property are kept private to her alone.

Fifth, the plan which Mrs. Sim has been making for her life for the last 20 years is carried out. Her estate plan is accelerated. But any court appointment can be directly contrary to her estate plan.

Sixth, Mrs. Sim can select a trustee who she trusts, who she knows will always give her his undivided loyalty. She wants someone who will do all the extra special things that make an elderly person's life dignified and enjoyable. But any court appointee always has a natural incentive to spend less of Mrs. Sim's money caring for her now so that more money will be left over after she dies.

Seventh, any attorney who sues Mrs. Sim for guardianship is stopped from later coming into court to charge her a handsome fee for doing all the things he claims he has been doing purely for her own "benefit," and also trying to capture her estate after she dies.

Mrs. Sim has set up her private legal arrangements entirely for her own benefit. It has already been proven that those arrangements work for every one of the purposes for which they were intended, and no court can ever prove any more that they do not work.

Dated this 9 day of March, 1984.

/s/ Harvey A. Neumeister
Harvey A. Neumeister

Subscribed and sworn to before me this 9 day of March, 1984.

/s/ Karen McGowan
Notary Public

Commission expires May 26, 1984

APPENDIX V

AFFIDAVIT

I, Harvey A. Neumeister, Lawyer, of Nebraska City, Nebraska, being duly sworn on oath, states as follows:

I have a duly acknowledged Power of Attorney from Maude Clevenger Sim to act on her behalf, as follows:

> "to do, perform, conduct and transact all of my business of every description, kind and nature, whereever located or situated, which I can or could do on my own, including, but not limited to, endorsing and depositing or cashing of all checks, money orders, drafts and vouchers; to make deposits in and withdrawals from all checking and savings accounts in my name; to have issued, reissued or cashed certificates of deposit or any other instruments or accounts evidencing savings and investments in my name; to buy, sell or exchange stocks and bonds; to make, execute, join in and deliver all deed, bills of sale, contracts and all other legal instruments in the buying, selling or exchanging of property, real, personal or mixed, or in the transaction of all of my business affairs; to surrender and cash all insurance policies in my name to receive all proceeds therefrom; to have full and unrestricted access to any safe deposit box in my name for the purpose of removing any and all contents thereof; to enter into all governmental programs and to make, execute and deliver all instruments needed in connection therewith; all as within my said attorney's sole discretion he deems advisable,
>
> THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY DISABILITY OF THE PRINCIPAL

giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof."

Dated this 12 day of March, 1984.

/s/ Harvey A. Neumeister

Subscribed and sworn to before me this 12 day of March, 1984.

/s/ Karen McGowan
Notary Public

Commission expires May 26, 1984